

JAN 17 2020

A BILL FOR AN ACT

RELATING TO CHILDREN.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that the State has a
2 paramount interest in protecting all human life. Accordingly,
3 any infant born alive, even after an attempted abortion, is a
4 legal person for all purposes under the federal and state
5 constitutions, and under other federal and state laws. The
6 legislature also finds that nationwide, nearly six thousand
7 abortions reportedly occurred after twenty weeks of gestation, a
8 time during which a fetus could be viable. Further, Canadian
9 statistics report that four hundred and ninety-one live births
10 occurred over a nine-year period that resulted in subsequent
11 neonatal deaths after an attempted abortion. Without proper
12 legal protection, newborn infants who have unexpectedly survived
13 an abortion procedure may be denied appropriate life-saving or
14 life-sustaining medical care and treatment and be left to die.

15 The legislature further finds that protecting an infant
16 whose live birth occurred in spite of an attempted abortion does
17 not infringe on a woman's right to choose or obtain an abortion



1 under existing federal or state law, or interfere with the
2 ability of licensed health care professionals to provide legal
3 abortions.

4 The purpose of this Act is to ensure the protection and
5 promotion of the health and well-being of all infants who
6 survive abortion attempts in the State by:

7 (1) Mandating that healthcare providers provide medically
8 appropriate and reasonable life-saving and life-
9 sustaining medical care and treatment to all born-
10 alive infants; and

11 (2) Establishing penalties for failing to provide that
12 medical care and treatment.

13 SECTION 2. The Hawaii Revised Statutes is amended by
14 adding a new chapter to be appropriately designated and to read
15 as follows:

16 "CHAPTER

17 ABORTION SURVIVORS PROTECTION ACT

18 § -1 **Definitions.** For the purposes of this chapter,
19 unless the context requires otherwise:



1 "Abortion" means the use or prescription of any instrument,
2 medicine, drug, or any other substance or device to
3 intentionally:

4 (1) End the life of the unborn child of a woman known to
5 be pregnant; or

6 (2) Terminate the pregnancy of a woman known to be
7 pregnant, with an intention other than:

8 (A) After viability, to produce a live birth and
9 preserve the life and health of the child born
10 alive; or

11 (B) To remove a dead unborn child.

12 "Attempt", with respect to abortion, means conduct that
13 under the circumstances as the actor believes them to be,
14 constitutes a substantial step in a course of conduct planned to
15 culminate in performing an abortion.

16 "Born alive" or "live birth" means the complete expulsion
17 or extraction of a viable infant from his or her mother,
18 regardless of the state of gestational development, that after
19 expulsion or extraction, whether or not the umbilical cord has
20 been cut or the placenta is attached, shows evidence of life,
21 including:



- 1 (1) Breathing;
- 2 (2) A heartbeat;
- 3 (3) Umbilical cord pulsations;
- 4 (4) Definite movement of voluntary muscles; or
- 5 (5) Any other evidence of life according to standard
- 6 medical practice.

7 "Consent" means the voluntary agreement or acquiescence by
8 a person of age and with the requisite mental capacity who is
9 not under duress or coercion and who has knowledge or
10 understanding of the act or action to which the person agreed or
11 acquiesced.

12 "Healthcare provider" means any person providing aid or
13 assistance to a physician or a nurse, or any person authorized
14 to provide healthcare to the mother during an abortion.

15 "Infant" means a human child who has been completely
16 expelled or extracted from the child's mother regardless of the
17 stage of gestational development, until the age of thirty days
18 post birth.

19 "Nurse" means a person who has been or is currently
20 licensed under chapter 457.

21 "Physician" means:



1 (1) A physician or surgeon licensed to practice medicine
2 or osteopathy pursuant to chapter 453; or

3 (2) A person who is not a physician or surgeon so licensed
4 but nevertheless directly performs or attempts to
5 perform an abortion.

6 "Unborn child" means a human fetus, beginning at
7 fertilization, until the point of being born alive.

8 § -2 **Requirements and responsibilities.** (a) A person
9 shall not deny or deprive an infant born alive of nourishment
10 with the intent to cause or allow the death of the infant for
11 any reason.

12 (b) A person shall not deprive an infant born alive of
13 medically appropriate and reasonable medical care and treatment
14 or surgical care.

15 (c) This section shall not be construed to prohibit an
16 infant's parent or guardian from refusing to give consent to
17 medical treatment or surgical care that is not medically
18 necessary or reasonable, including care or treatment that:

19 (1) Is not necessary to save the life of the infant;



1 (2) Has a potential risk of harm to the infant's life or
2 health that outweighs the potential benefit to the
3 infant of the treatment or care; or

4 (3) Will do no more than temporarily prolong the act of
5 dying, as in the case of non-viable infant, when death
6 is imminent.

7 (d) The physician performing an abortion shall take all
8 medically appropriate and reasonable steps to preserve the life
9 and health of an infant born alive. If an abortion is performed
10 in a hospital but a live birth nevertheless occurs, the
11 physician attending the abortion shall provide immediate medical
12 care to the infant, inform the mother of the live birth, and
13 request transfer of the infant to an on-duty resident or
14 emergency care physician who shall provide medically appropriate
15 and reasonable care and treatment to the infant.

16 If an abortion is performed in a hospital but a live birth
17 nevertheless occurs, the physician attending the abortion shall
18 provide medically appropriate and reasonable care and treatment
19 to the infant.

20 (e) If the physician described in subsection (d) is unable
21 to perform the duties of subsection (d) because the physician is



1 assisting the woman on whom the abortion was performed, an
2 attending physician's assistant, nurse, or other healthcare
3 provider shall assume the duties outlines in subsection (d).

4 (f) Any infant born alive, including one born in the
5 course of an abortion procedure, shall be treated as a legal
6 person under the laws of this State, with the same rights to
7 medically appropriate and reasonable care and treatment.

8 (g) If, before the abortion, the mother has stated in
9 writing that she does not wish to maintain custody of the infant
10 in the event that the infant is born alive, and this writing is
11 not retracted before the attempted abortion, the infant, if born
12 alive, shall immediately become a ward under the care of the
13 department of human services.

14 (h) No person shall use, or authorize to be used, any born
15 alive infant for any type of scientific research or other kind
16 of experimentation, except as necessary to protect the life and
17 health of the infant born alive.

18 (i) Any physician, nurse, other healthcare provider, or
19 employee of a hospital, a physician's office or clinic who has
20 knowledge of failure to comply with this section shall
21 immediately report the failure to law enforcement.



1 § -3 **Criminal penalties.** (a) Any physician, nurse, or
2 other healthcare provider who intentionally performs an overt
3 act that kills an infant born alive shall be guilty of the
4 offense of murder in the second degree under section 707-701.5.

5 (b) Any physician, nurse, or other healthcare provider who
6 recklessly fails to provide medically appropriate and reasonable
7 care and treatment to an infant born alive, where, as a result
8 of that failure, the infant dies, shall be guilty of the offense
9 of manslaughter under section 707-702.

10 (c) If any physician, nurse, other healthcare provider, or
11 person, including a parent or guardian, conceals the corpse of
12 an infant with the intent to conceal the fact of the infant's
13 birth or to prevent a determination of whether the infant was
14 born alive or dead, that person shall be guilty of the offense of
15 concealing the corpse of an infant under section 709-901.

16 (d) Any physician, nurse, other healthcare provider, or
17 person, including a parent or guardian, who knowingly violates
18 section -2(h) shall be fined not more than \$10,000 or
19 imprisoned not more than five years, or both.



1 (e) The mother of a child born alive may not be prosecuted
2 for conspiracy in or as an accomplice to violating subsection
3 (b).

4 § -4 Civil action. (a) If a child is born alive and a
5 healthcare provider violates section -2(d), the woman upon
6 whom the abortion was performed or attempted may, in a civil
7 action against any person who committed the violation, obtain
8 appropriate relief. Any civil action may be based on a claim
9 that the death of or injury to the infant born alive was a
10 result of simple negligence, gross negligence, wantonness,
11 willfulness, intentional conduct or another violation of the
12 legal standard of care.

13 (b) Appropriate relief in a civil action under this
14 section includes:

- 15 (1) Objective verifiable money damages occasioned by the
16 violation of subsection -2(d);
- 17 (2) Damages up to three times the cost of the abortion or
18 attempted abortion;
- 19 (3) Punitive damages; and
- 20 (4) Other appropriate relief pursuant to applicable law.



1 (c) Any conviction under section -3 shall be admissible
2 in a civil suit as prima facie evidence of a failure to provide
3 medically appropriate and reasonable care and treatment to a
4 born alive infant.

5 (d) The court shall award a reasonable attorney's fee as
6 part of the costs to a prevailing plaintiff in a civil action
7 under this section.

8 (e) If a defendant in a civil action under this subsection
9 prevails and the court finds that the plaintiff's suit was
10 frivolous, the court shall award a reasonable attorney's fee in
11 favor of the defendant against the plaintiff.

12 (f) Except as provided in subsection (e), in a civil
13 action under this section, no damages, attorney's fee or other
14 monetary relief may be assessed against the woman upon whom the
15 abortion was performed.

16 § -5 **Professional disciplinary action.** Failure to
17 comply with the requirements of this chapter shall provide a
18 basis for professional disciplinary action under chapter 453,
19 chapter 457, or any other appropriate chapter, or any
20 appropriate combination thereof, for the suspension or
21 revocation of any license for physicians, licensed and



1 registered nurses, or other licensed or regulated persons. Any
2 conviction of any person for any failure to comply with the
3 requirements of this chapter shall result in the automatic
4 suspension of his or her license for a period of no less than
5 one year.

6 § -6 **Construction.** (a) Nothing in this chapter shall
7 be construed to affirm, deny, expand, or contract any legal
8 status or legal right applicable to natural persons at any point
9 before being born alive.

10 (b) Nothing in this chapter shall be construed to affect
11 existing federal or state law regarding abortion. Nothing in
12 this chapter shall be construed to restrict a woman's right to
13 obtain an abortion pursuant to applicable law, nor shall it be
14 construed to restrict the ability of any licensed healthcare
15 providers to perform an abortion in accordance with applicable
16 law.

17 (c) Nothing in this chapter shall be construed as creating
18 or recognizing a right to abortion.

19 (d) Nothing in this chapter shall be construed to alter
20 generally accepted medical standards."



1 SECTION 3. Section 453-8, Hawaii Revised Statutes, is
2 amended by amending subsection (a) to read as follows:

3 "(a) In addition to any other actions authorized by law,
4 any license to practice medicine and surgery may be revoked,
5 limited, or suspended by the board at any time in a proceeding
6 before the board, or may be denied, for any cause authorized by
7 law, including [~~but not limited to the following~~]:

8 (1) Procuring, or aiding or abetting in procuring, a
9 criminal abortion;

10 (2) Failure to comply with chapter ;

11 [~~+2~~] (3) Employing any person to solicit patients for
12 one's self;

13 [~~+3~~] (4) Engaging in false, fraudulent, or deceptive
14 advertising, including [~~but not limited to~~]:

15 (A) Making excessive claims of expertise in one or
16 more medical specialty fields;

17 (B) Assuring a permanent cure for an incurable
18 disease; or

19 (C) Making any untruthful and improbable statement in
20 advertising one's medical or surgical practice or
21 business;



- 1 ~~[(4)]~~ (5) Being habituated to the excessive use of drugs or
2 alcohol; or being addicted to, dependent on, or a
3 habitual user of a narcotic, barbiturate, amphetamine,
4 hallucinogen, or other drug having similar effects;
- 5 ~~[(5)]~~ (6) Practicing medicine while the ability to practice
6 is impaired by alcohol, drugs, physical disability, or
7 mental instability;
- 8 ~~[(6)]~~ (7) Procuring a license through fraud,
9 misrepresentation, or deceit, or knowingly permitting
10 an unlicensed person to perform activities requiring a
11 license;
- 12 ~~[(7)]~~ (8) Professional misconduct, hazardous negligence
13 causing bodily injury to another, or manifest
14 incapacity in the practice of medicine or surgery;
- 15 ~~[(8)]~~ (9) Incompetence or multiple instances of negligence,
16 including ~~[but not limited to]~~ the consistent use of
17 medical service, which is inappropriate or
18 unnecessary;
- 19 ~~[(9)]~~ (10) Conduct or practice contrary to recognized
20 standards of ethics of the medical profession as
21 adopted by the Hawaii Medical Association, the



1 American Medical Association, the Hawaii Association
2 of Osteopathic Physicians and Surgeons, or the
3 American Osteopathic Association;

4 ~~(10)~~ (11) Violation of the conditions or limitations upon
5 which a limited or temporary license is issued;

6 ~~(11)~~ (12) Revocation, suspension, or other disciplinary
7 action by another state or federal agency of a
8 license, certificate, or medical privilege;

9 ~~(12)~~ (13) Conviction, whether by nolo contendere or
10 otherwise, of a penal offense substantially related to
11 the qualifications, functions, or duties of a
12 physician or osteopathic physician, notwithstanding
13 any statutory provision to the contrary;

14 ~~(13)~~ (14) Violation of chapter 329, the uniform controlled
15 substances act, or any rule adopted thereunder except
16 as provided in section 329-122;

17 ~~(14)~~ (15) Failure to report to the board, in writing, any
18 disciplinary decision issued against the licensee or
19 the applicant in another jurisdiction within thirty
20 days after the disciplinary decision is issued; or



1 [~~(15)~~] (16) Submitting to or filing with the board any
2 notice, statement, or other document required under
3 this chapter, which is false or untrue or contains any
4 material misstatement or omission of fact."

5 SECTION 4. Section 457-12, Hawaii Revised Statutes, is
6 amended by amending subsection (a) to read as follows:

7 "(a) In addition to any other actions authorized by law,
8 the board shall have the power to deny, revoke, limit, or
9 suspend any license to practice nursing as a registered nurse or
10 as a licensed practical nurse applied for or issued by the board
11 in accordance with this chapter, and to fine or to otherwise
12 discipline a licensee for any cause authorized by law, including
13 [~~but not limited to the following~~]:

- 14 (1) Fraud or deceit in procuring or attempting to procure
15 a license to practice nursing as a registered nurse or
16 as a licensed practical nurse;
- 17 (2) Gross immorality;
- 18 (3) Unfitness or incompetence by reason of negligence,
19 habits, or other causes;
- 20 (4) Habitual intemperance, addiction to, or dependency on
21 alcohol or other habit-forming substances;



- 1 (5) Mental incompetence;
- 2 (6) Unprofessional conduct as defined by the board in
- 3 accordance with its own rules;
- 4 (7) Wilful or repeated violation of any of the provisions
- 5 of this chapter or any rule adopted by the board;
- 6 (8) Revocation, suspension, limitation, or other
- 7 disciplinary action by another state of a nursing
- 8 license;
- 9 (9) Conviction, whether by nolo contendere or otherwise,
- 10 of a penal offense substantially related to the
- 11 qualifications, functions, or duties of a nurse,
- 12 notwithstanding any statutory provision to the
- 13 contrary;
- 14 (10) Failure to report to the board any disciplinary action
- 15 taken against the licensee in another jurisdiction
- 16 within thirty days after the disciplinary action
- 17 becomes final;
- 18 (11) Submitting to or filing with the board any notice,
- 19 statement, or other document required under this
- 20 chapter, which is false or untrue or contains any
- 21 material misstatement of fact, including a false



1 attestation of compliance with continuing competency
2 requirements;

3 (12) Failure to comply with chapter ;

4 ~~(12)~~ (13) Violation of the conditions or limitations upon
5 which any license is issued; or

6 ~~(13)~~ (14) Violation of chapter 329, the uniform controlled
7 substances act, or any rule adopted thereunder except
8 as provided in section 329-122."

9 SECTION 5. Section 709-901, Hawaii Revised Statutes, is
10 amended to read as follows:

11 "**§709-901 Concealing the corpse of an infant.** (1) A
12 person commits the offense of concealing the corpse of an infant
13 if the person conceals the corpse of a new-born child with
14 intent to conceal the fact of ~~[its]~~ the child's birth or to
15 prevent a determination of whether ~~[it]~~ the child was born dead
16 or alive.

17 (2) If an abortion as defined in section -1 is
18 attempted but a live birth nevertheless occurs, the surviving
19 infant shall be considered a new-born child for the purposes of
20 this section.



1 [~~2~~] (3) Concealing the corpse of an infant is a
2 misdemeanor."

3 SECTION 6. This Act does not affect rights and duties that
4 matured, penalties that were incurred, and proceedings that were
5 begun before its effective date.

6 SECTION 7. Statutory material to be repealed is bracketed
7 and stricken. New statutory material is underscored.

8 SECTION 8. This Act shall take effect on July 1, 2020;
9 provided that the amendments made to section 457-12, Hawaii
10 Revised Statutes, by section 4 of this Act shall not be repealed
11 when that section is reenacted on June 30, 2023, pursuant to
12 section 6 of Act 66, Session Laws of Hawaii 2017.

13

INTRODUCED BY: Kurt Ferrell

Anna Mercedes K.



S.B. NO. 2237

Report Title:

Abortion Survivors; Born Alive Infant; Penalties

Description:

Ensures the protection and promotion of the health and well-being of all infants born alive in the State. Mandates medically appropriate and reasonable life-saving and life-sustaining medical care and treatment to all born alive infants. Establishes civil and criminal penalties.

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