

JAN 17 2020

A BILL FOR AN ACT

RELATING TO THE TERMINATION OF PREGNANCY.

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

1 SECTION 1. The Hawaii Revised Statutes is amended by
2 adding a new chapter to be appropriately designated and to read
3 as follows:

4 "CHAPTER

5 PAIN-CAPABLE UNBORN CHILD PROTECTION AND DISMEMBERMENT ABORTION

6 BAN ACT

7 PART I. GENERAL PROVISIONS

8 § -1 **Definitions.** As used in this chapter, unless the
9 context indicates otherwise:

10 "Abortion" means the use or prescription of any instrument,
11 medicine, drug, or any other substance or device to
12 intentionally:

- 13 (1) Kill the unborn child of a woman known to be pregnant;
14 or
15 (2) Terminate the pregnancy of a woman known to be
16 pregnant, with an intention other than:



1 (A) After viability, to produce a live birth and
2 preserve the life and health of the child born
3 alive; or

4 (B) To remove a dead unborn child.

5 "Attempt", with respect to abortion, means conduct that
6 under the circumstances as the actor believes them to be,
7 constitutes a substantial step in a course of conduct planned to
8 culminate in performing an abortion.

9 "Born alive" or "live birth" means the complete expulsion
10 or extraction of an infant from his or her mother, regardless of
11 the state of gestational development, that after expulsion or
12 extraction, whether or not the umbilical cord has been cut or
13 the placenta is attached, shows evidence of life, including:

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



1 "Counseling" means counseling provided by a counselor
2 licensed by the State, or a victim's rights advocate provided by
3 a law enforcement agency.

4 "Dismemberment abortion":

5 (1) Means, with the purpose of causing the death of an
6 unborn child, knowingly dismembering a living unborn
7 child and extracting the unborn child one piece at a
8 time or intact but crushed from the uterus through the
9 use of clamps, grasping forceps, tongs, scissors or
10 similar instruments that, through the convergence of
11 two rigid levers, slice, crush, or grasp a portion of
12 the unborn child's body in order to cut or rip it off
13 or crush it; but

14 (2) Does not include an abortion that uses suction to
15 dismember the body of the unborn child by sucking
16 fetal parts into a collection container unless the
17 actions described in paragraph (1) are used to cause
18 the death of an unborn child but suction is
19 subsequently used to extract fetal parts after the
20 death of the unborn child.



1 "Facility" means any medical or counseling group, center or
2 clinic and includes the entire legal entity, including any
3 entity that controls, is controlled by, or is under common
4 control with such facility.

5 "Fertilization" means the fusion of human spermatozoon with
6 a human ovum.

7 "Fiscal year" means the period beginning July 1 of one
8 calendar year to June 30 of the following calendar year.

9 "Medical treatment" means treatment provided at a hospital
10 licensed by the State, at a medical clinic licensed by the
11 State, or from a physician.

12 "Minor" means an individual under eighteen years of age.

13 "Pain-capable unborn child" means an unborn child that has
14 attained a post-fertilization age at which the child is capable
15 of experiencing pain.

16 "Perform", with respect to an abortion, includes inducing
17 an abortion through a medical or chemical intervention including
18 writing a prescription for a drug or device intended to result
19 in an abortion.

20 "Physician" means a physician or surgeon licensed to
21 practice medicine or osteopathy under chapter 453.



1 "Post-fertilization age" means the age of the unborn child
2 as calculated from the fusion of a human spermatozoon with a
3 human ovum.

4 "Probable post-fertilization age" means the age that, in
5 reasonable medical judgment, will with reasonable probability be
6 the post-fertilization age of the unborn child at the time the
7 abortion is planned to be performed or induced.

8 "Reasonable medical judgment" means a medical judgment by a
9 reasonably prudent physician, knowledgeable about the case and
10 the treatment possibilities with respect to the medical
11 conditions involved.

12 "Unborn child" means an individual organism of the human
13 species, beginning at fertilization, until the point of being
14 born alive.

15 § -2 **General provisions.** Notwithstanding any law to the
16 contrary, it shall be unlawful for any physician to perform an
17 abortion or attempt to do so, unless in conformity with this
18 chapter.

19 **PART II. ABORTIONS OF PAIN-CAPABLE UNBORN CHILDREN**

20 § -11 **Assessment of post-fertilization age.** (a) A
21 physician performing or attempting an abortion shall first



1 determine the probable post-fertilization age of the unborn
2 child or reasonably rely upon a determination made by another
3 physician. In making that determination, the physician shall
4 make inquiries of the pregnant woman and perform or cause to be
5 performed medical examinations and tests that a reasonably
6 prudent physician, knowledgeable about the case and the medical
7 conditions involved, would consider necessary to make an
8 accurate determination of post-fertilization age.

9 (b) If the probable post-fertilization age of the unborn
10 child is at least twenty weeks, the child shall be considered a
11 pain-capable unborn child.

12 § -12 Prohibition of abortion of pain-capable unborn
13 child; exceptions. (a) Except as provided in subsection (b),
14 an abortion shall not be performed or attempted if, as
15 determined pursuant to the assessment performed under
16 section -11, the unborn child is a pain-capable unborn child.

17 (b) Subsection (a) shall not apply if:

18 (1) In reasonable medical judgment, the abortion is
19 necessary to save the life of a pregnant woman whose
20 life is endangered by a physical disorder, physical
21 illness, or physical injury, including a life-



1 endangering physical condition caused by or arising
2 from the pregnancy itself, but not including
3 psychological or emotional conditions;

4 (2) The pregnancy is the result of rape against an adult
5 woman who, at least forty-eight hours before the
6 abortion, has obtained:

7 (A) Counseling for the rape; or

8 (B) Medical treatment for the rape or for an injury
9 related to the rape;

10 (3) The pregnancy is the result of rape against an adult
11 woman and the rape has been reported at any time
12 before the abortion to a law enforcement agency; or

13 (4) The pregnancy is a result of rape against a minor or
14 incest against a minor, and the rape or incest has
15 been reported at any time before the abortion to any:

16 (A) Government agency authorized to act on reports of
17 child abuse; or

18 (B) Law enforcement agency;

19 provided that the unborn child is sedated or aborted before any
20 dismemberment of the child's body is made.



1 § -13 Requirement as to manner of procedure performed.

2 Notwithstanding the definitions of "abortion" and "attempt" in
3 section -1, a physician terminating or attempting to
4 terminate a pregnancy pursuant to an exception provided under
5 section -12(b) may do so only in a manner that, in reasonable
6 medical judgment, provides the best opportunity for the unborn
7 child to survive.

8 § -14 Documentation requirements. (a) A physician who

9 performs or attempts to perform an abortion on an adult woman
10 pursuant to an exception provided by section -12(b)(2) shall,
11 before the abortion, place in the patient medical file
12 documentation from a:

- 13 (1) Hospital licensed by the State or operated under
14 authority of a federal agency;
- 15 (2) Medical clinic licensed by the State or operated under
16 authority of a federal agency;
- 17 (3) Personal physician licensed by the State;
- 18 (4) Counselor licensed by the State; or
- 19 (5) Victim's rights advocate provided by a law enforcement
20 agency,



1 that the adult woman seeking the abortion obtained medical
2 treatment or counseling for the rape or for an injury related to
3 the rape.

4 (b) A physician who performs or attempts to perform an
5 abortion on an adult woman pursuant to an exception provided by
6 section -12(b)(3) shall, before the abortion, place in the
7 patient medical file documentation from the law enforcement
8 agency to which the rape was reported.

9 (c) A physician who performs or attempts to perform an
10 abortion on a minor pursuant to an exception provided under
11 section -12(b)(4) shall, before the abortion, place in the
12 patient medical file documentation from the government agency or
13 law enforcement agency to which the rape or incest of the minor
14 was reported.

15 (d) Section 622-58 shall apply to the documentation
16 required under this section.

17 § -15 **Informed consent.** (a) A physician who intends to
18 perform or attempt to perform an abortion of a pain-capable
19 unborn child under the provisions of section -12(b) shall not
20 commence the abortion procedure without first providing the
21 woman seeking the abortion a disclosure form that shall include:



- 1 (1) A statement by the physician indicating the probable
2 post-fertilization age of the pain-capable unborn
3 child;
- 4 (2) A statement by the physician that the unborn child,
5 due to the child's stage of development at that post-
6 fertilization age, is capable of experiencing pain;
- 7 (3) A statement that state law authorizes an abortion
8 after twenty weeks fetal age only if the mother's life
9 is endangered by a physical disorder, physical
10 illness, or physical injury, when the pregnancy was
11 the result of rape, or an act of incest against a
12 minor;
- 13 (4) A statement that the abortion must be performed by the
14 method most likely to allow the child to be born alive
15 unless this would cause significant risk to the
16 mother; and
- 17 (5) A statement that these requirements are binding upon
18 the physician and all other medical personnel who are
19 subject to criminal and civil penalties, and that a
20 woman on whom an abortion has been performed may take
21 civil action if these requirements are not followed.



1 (b) The abortion disclosure form shall be signed in person
2 by the woman seeking the abortion, who shall indicate whether or
3 not she understands the contents of the form. If she does not
4 understand the contents of the form, the abortion shall not be
5 performed, unless the exception under section -16 applies.
6 The physician performing the abortion and a witness shall also
7 sign the form. The physician shall maintain the form in the
8 patient's medical file.

9 (c) Section 622-58 shall apply to the form required under
10 this section.

11 § -16 **Additional exception.** If, in reasonable medical
12 judgement, compliance with section -13, section -15, or
13 both, would pose a greater risk of:

- 14 (1) The death of the pregnant woman; or
- 15 (2) The substantial and irreversible physical impairment
16 of a major bodily function, not including
17 psychological or emotional conditions, of the pregnant
18 woman,

19 the physician shall be exempt from section -13 or from
20 section -15, or both, to the extent necessary to avoid the
21 death or impairment.



1 § -17 **Exclusion of certain facilities.** Notwithstanding
2 the definitions of the terms "counseling" and "medical
3 treatment" in section -1, the counseling or medical treatment
4 provided by a facility that performs abortions shall not be
5 valid for the purposes of the exception provided under
6 section -12(b)(2), unless that facility is a hospital.

7 § -18 **Data collection.** (a) Any physician who performs
8 or attempts an abortion described in section -12(b)(2) shall
9 submit an annual summary of all those abortions to the
10 department of health not later than sixty days after the end of
11 each calendar year.

12 (b) Each annual summary shall include the number of
13 abortions performed or attempted on an unborn child who had a
14 post-fertilization age of twenty weeks or more and specify the
15 following for each abortion performed or attempted pursuant to
16 exception under section -12(b)(2):

- 17 (1) The probable post-fertilization age of the unborn
18 child;
- 19 (2) The method used to carry out the abortion;
- 20 (3) The location where the abortion was conducted;



1 (4) The exception under section -12(b)(2) under which
2 the abortion was conducted; and

3 (5) Any incident of live birth that occurred in spite of
4 an attempted abortion.

5 (c) A summary required under this section shall not
6 contain personal identifying patient information and shall be
7 submitted in compliance with federal and state laws requiring
8 patient privacy.

9 (d) The department of health shall prepare an annual
10 report providing statistics for the most recently completed
11 fiscal year, compiled from all of the summaries made to the
12 department under this section. The department shall ensure that
13 none of the information included in the public reports could
14 reasonably lead to the identification of any pregnant woman upon
15 whom an abortion was performed or attempted. The annual report
16 shall be submitted to the legislature no later than twenty days
17 prior to the convening of each regular legislative session. The
18 department shall also make the report available to the general
19 public.



1 **PART III. DISMEMBERMENT ABORTIONS**

2 § -21 **Dismemberment abortions prohibited; exception.**

3 (a) Except as provided in this section, no physician in this
4 State shall perform a dismemberment abortion.

5 (b) Subsection (a) shall not apply if the dismemberment
6 abortion is necessary to save the life of a mother whose life is
7 endangered by a physical disorder, physical illness, or physical
8 injury, including a life-endangering physical condition caused
9 by or arising from the pregnancy itself, but not including
10 psychological or emotional conditions.

11 § -22 **Construction.** Section -21 shall not be
12 construed to prohibit an abortion not otherwise prohibited by
13 this chapter or other state law, if performed by a method other
14 than dismemberment abortion.

15 **PART IV. PENALTIES; REMEDIES**

16 § -31 **Criminal penalties; bar to prosecution.** (a) A
17 physician who violates part II, except section -18, shall be
18 guilty of a class C felony.

19 (b) A physician who violates section -18 shall be
20 guilty of a violation.



1 (c) A physician who violates part III shall be guilty of a
2 class C felony; provided that the maximum term of imprisonment
3 shall be not more than two years.

4 (d) A woman upon whom an abortion is performed may not be
5 prosecuted for conspiracy in or as an accomplice to violating
6 this chapter.

7 § -32 Civil remedies. (a) A woman upon whom an
8 abortion has been performed or attempted in violation of any
9 provision of this chapter may, in a civil action against any
10 person who committed the violation, obtain appropriate relief.

11 (b) A parent of a minor upon whom an abortion has been
12 performed or attempted under an exception provided for in
13 section -12(b)(3), and that was performed in violation of any
14 provision of this chapter may, in a civil action against any
15 person who committed the violation, obtain appropriate relief,
16 unless the pregnancy resulted from the plaintiff's criminal
17 conduct.

18 (c) Appropriate relief in a civil action under this
19 section includes:



1 (1) Objective verifiable money damages for all injuries,
2 psychological and physical, occasioned by the
3 violation;

4 (2) Damages up to three times the cost of the abortion or
5 attempted abortion;

6 (3) Punitive damages; and

7 (4) Other appropriate relief pursuant to applicable law.

8 (d) The court shall award reasonable attorney's fees as
9 part of the costs to a prevailing plaintiff in a civil action
10 under this section.

11 (e) If a defendant in a civil action under this section
12 prevails and the court finds that the plaintiff's suit was
13 frivolous, the court shall award reasonable attorney's fees in
14 favor of the defendant against the plaintiff.

15 (f) Except as provided in subsection (e), in a civil
16 action under this section, no damages, attorney's fees or other
17 monetary relief may be assessed against the woman upon whom the
18 abortion was performed or attempted."

19 SECTION 2. Section 453-16, Hawaii Revised Statutes, is
20 amended to read as follows:



1 "§453-16 Intentional termination of pregnancy; penalties;
2 refusal to perform. (a) No abortion shall be performed in this
3 State unless:

4 (1) The abortion is performed by a licensed physician or
5 surgeon, or by a licensed osteopathic physician and
6 surgeon; [and]

7 (2) The abortion is performed in a hospital licensed by
8 the department of health or operated by the federal
9 government or an agency thereof, or in a clinic or
10 physician's or osteopathic physician's office[-]; and

11 (3) The abortion complies with chapter _____.

12 (b) [~~Abortion~~] "Abortion" shall [~~mean an operation to~~
13 ~~intentionally terminate the pregnancy of a nonviable fetus. The~~
14 ~~termination of a pregnancy of a viable fetus is not included in~~
15 ~~this section.~~] have the same meaning as in section _____-1.

16 (c) The State shall not deny or interfere with a female's
17 right to choose or obtain an abortion [~~of a nonviable fetus or~~
18 ~~an abortion~~] that is necessary to protect the life [~~or health~~]
19 of the female.

20 (d) Any person who knowingly violates subsection [~~(a)~~]

21 (a) (1) or (2) shall be fined not more than \$1,000 or imprisoned



1 not more than five years, or both. Any person who violates
2 subsection (a)(3) shall be subject to the penalties established
3 in chapter _____.

4 (e) Nothing in this section shall require any hospital or
5 any person to participate in an abortion nor shall any hospital
6 or any person be liable for a refusal."

7 SECTION 3. This Act does not affect rights and duties that
8 matured, penalties that were incurred, and proceedings that were
9 begun before its effective date.

10 SECTION 4. Statutory material to be repealed is bracketed
11 and stricken. New statutory material is underscored.

12 SECTION 5. This Act shall take effect on July 1, 2020.

13

INTRODUCED BY: Kurt Ferrelle



S.B. NO. 2238

Report Title:

Abortion; Pain Capable; Dismemberment; Prohibitions; Exceptions

Description:

Prohibits the abortion of a fetus that is capable of feeling pain. Prohibits abortions by dismemberment. Provides certain exceptions. Establishes penalties.

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