

E AND R AMENDMENTS TO LB 594

Introduced by Enrollment and Review Committee: Nordquist, 7,
Chairperson

1 1. Strike the original sections and all amendments
2 thereto and insert the following new sections:

3 Section 1. Section 28-101, Revised Statutes Supplement,
4 2009, is amended to read:

5 28-101 Sections 28-101 to 28-1356 and sections 5 to 11 of
6 this act shall be known and may be cited as the Nebraska Criminal
7 Code.

8 Sec. 2. Section 28-325, Reissue Revised Statutes of
9 Nebraska, is amended to read:

10 28-325 The Legislature hereby finds and declares:

11 (1) That the following provisions were motivated by
12 the legislative intrusion of the United States Supreme Court by
13 virtue of its decision removing the protection afforded the unborn.
14 Sections 28-325 to 28-345 and sections 5 to 11 of this act are in
15 no way to be construed as legislatively encouraging abortions at
16 any stage of unborn human development, but are rather an expression
17 of the will of the people of the State of Nebraska and the members
18 of the Legislature to provide protection for the life of the unborn
19 child whenever possible;

20 (2) That the members of the Legislature expressly deplore
21 the destruction of the unborn human lives which has and will occur
22 in Nebraska as a consequence of the United States Supreme Court's
23 decision on abortion of January 22, 1973;

1 (3) That it is in the interest of the people of the State
2 of Nebraska that every precaution be taken to insure the protection
3 of every viable unborn child being aborted, and every precaution
4 be taken to provide life-supportive procedures to insure the unborn
5 child its continued life after its abortion;

6 (4) That currently this state is prevented from providing
7 adequate legal remedies to protect the life, health, and welfare of
8 pregnant women and unborn human life; and

9 (5) That it is in the interest of the people of the
10 State of Nebraska to maintain accurate statistical data to aid in
11 providing proper maternal health regulations and education;—

12 (6) That the existing standard of care for preabortion
13 screening and counseling is not always adequate to protect the
14 health needs of women;

15 (7) That clarifying the minimum standard of care for
16 preabortion screening and counseling in statute is a practical
17 means of protecting the well-being of women and may better ensure
18 that abortion doctors are sufficiently aware of each patient's
19 risk profile so they may give each patient a well-informed medical
20 opinion regarding her unique case; and

21 (8) That providing right to redress against nonphysicians
22 who perform illegal abortions or encourage self-abortions is an
23 important means of protecting women's health.

24 Sec. 3. Section 28-326, Revised Statutes Supplement,
25 2009, is amended to read:

26 28-326 For purposes of sections 28-325 to 28-345 and
27 sections 5 to 11 of this act, unless the context otherwise

1 requires:

2 (1) Abortion means the use or prescription of any
3 instrument, medicine, drug, or other substance or device
4 intentionally to terminate the pregnancy of a woman known to be
5 pregnant with an intention other than to increase the probability
6 of a live birth, to preserve the life or health of the child after
7 live birth, or to remove a dead unborn child, and which causes the
8 premature termination of the pregnancy;

9 (2) Complications associated with abortion means any
10 adverse physical, psychological, or emotional reaction that is
11 reported in a peer-reviewed journal to be statistically associated
12 with abortion such that there is less than a five percent
13 probability (P < .05) that the result is due to chance;

14 (3) Conception means the fecundation of the ovum by the
15 spermatozoa;

16 (4) Emergency situation means that condition which, on
17 the basis of the physician's good faith clinical judgment, so
18 complicates the medical condition of a pregnant woman as to
19 necessitate the immediate abortion of her pregnancy to avert her
20 death or for which a delay will create serious risk of substantial
21 impairment of a major bodily function;

22 ~~(2)~~ (5) Hospital means those institutions licensed by the
23 Department of Health and Human Services pursuant to the Health Care
24 Facility Licensure Act;

25 (6) Negligible risk means a risk that a reasonable person
26 would consider to be immaterial to a decision to undergo an
27 elective medical procedure;

1 (7) Partial-birth abortion means an abortion procedure
2 in which the person performing the abortion partially delivers
3 vaginally a living unborn child before killing the unborn child and
4 completing the delivery. For purposes of this subdivision, the term
5 partially delivers vaginally a living unborn child before killing
6 the unborn child means deliberately and intentionally delivering
7 into the vagina a living unborn child, or a substantial portion
8 thereof, for the purpose of performing a procedure that the person
9 performing such procedure knows will kill the unborn child and does
10 kill the unborn child;

11 ~~(3)~~ (8) Physician means any person licensed to practice
12 medicine in this state as provided in the Uniform Credentialing
13 Act;

14 ~~(4)~~ (9) Pregnant means that condition of a woman who has
15 unborn human life within her as the result of conception;

16 ~~(5)~~ Conception means the fecundation of the ovum by the
17 spermatozoa;

18 (10) Probable gestational age of the unborn child means
19 what will with reasonable probability, in the judgment of the
20 physician, be the gestational age of the unborn child at the time
21 the abortion is planned to be performed;

22 (11) Risk factor associated with abortion means
23 any factor, including any physical, psychological, emotional,
24 demographic, or situational factor, for which there is a
25 statistical association with one or more complications associated
26 with abortion such that there is less than a five percent
27 probability (P < .05) that such statistical association is due to

1 chance. Such information on risk factors shall have been published
2 in any peer-reviewed journals indexed by the United States National
3 Library of Medicine's search services (PubMed or MEDLINE) or in any
4 journal included in the Thomson Reuters Scientific Master Journal
5 List not less than twelve months prior to the day preabortion
6 screening was provided;

7 (12) Self-induced abortion means any abortion or
8 menstrual extraction attempted or completed by a pregnant woman on
9 her own body;

10 (13) Ultrasound means the use of ultrasonic waves for
11 diagnostic or therapeutic purposes, specifically to monitor an
12 unborn child;

13 ~~(6)~~ (14) Viability means that stage of human development
14 when the unborn child is potentially able to live more than merely
15 momentarily outside the womb of the mother by natural or artificial
16 means; and

17 ~~(7)~~ Emergency situation means that condition which, on
18 the basis of the physician's good faith clinical judgment, so
19 complicates the medical condition of a pregnant woman as to
20 necessitate the immediate abortion of her pregnancy to avert her
21 death or for which a delay will create serious risk of substantial
22 impairment of a major bodily function;

23 ~~(8)~~ Probable gestational age of the unborn child means
24 what will with reasonable probability, in the judgment of the
25 physician, be the gestational age of the unborn child at the time
26 the abortion is planned to be performed;

27 ~~(9)~~ Partial-birth abortion means an abortion procedure

1 in which the person performing the abortion partially delivers
2 vaginally a living unborn child before killing the unborn child and
3 completing the delivery. For purposes of this subdivision, the term
4 partially delivers vaginally a living unborn child before killing
5 the unborn child means deliberately and intentionally delivering
6 into the vagina a living unborn child, or a substantial portion
7 thereof, for the purpose of performing a procedure that the person
8 performing such procedure knows will kill the unborn child and does
9 kill the unborn child;

10 ~~(10)~~ (15) Woman means any female human being whether or
11 not she has reached the age of majority, and

12 ~~(11)~~ Ultrasound means the use of ultrasonic waves for
13 diagnostic or therapeutic purposes, specifically to monitor an
14 unborn child.

15 Sec. 4. Section 28-327, Revised Statutes Supplement,
16 2009, is amended to read:

17 28-327 No abortion shall be performed except with the
18 voluntary and informed consent of the woman upon whom the abortion
19 is to be performed. Except in the case of an emergency situation,
20 consent to an abortion is voluntary and informed only if:

21 (1) The woman is told the following by the physician who
22 is to perform the abortion, by the referring physician, or by a
23 physician assistant or registered nurse licensed under the Uniform
24 Credentialing Act who is an agent of either physician, at least
25 twenty-four hours before the abortion:

26 (a) The particular medical risks associated with the
27 particular abortion procedure to be employed including, when

1 medically accurate, the risks of infection, hemorrhage, perforated
2 uterus, danger to subsequent pregnancies, and infertility;

3 (b) The probable gestational age of the unborn child at
4 the time the abortion is to be performed;

5 (c) The medical risks associated with carrying her child
6 to term; and

7 (d) That she cannot be forced or required by anyone to
8 have an abortion and is free to withhold or withdraw her consent
9 for an abortion.

10 The person providing the information specified in this
11 subdivision to the person upon whom the abortion is to be
12 performed shall be deemed qualified to so advise and provide
13 such information only if, at a minimum, he or she has had
14 training in each of the following subjects: Sexual and reproductive
15 health; abortion technology; contraceptive technology; short-term
16 counseling skills; community resources and referral; and informed
17 consent. The physician or the physician's agent may provide this
18 information by telephone without conducting a physical examination
19 or tests of the patient, in which case the information required
20 to be supplied may be based on facts supplied by the patient and
21 whatever other relevant information is reasonably available to the
22 physician or the physician's agent;

23 (2) The woman is informed by telephone or in person, by
24 the physician who is to perform the abortion, by the referring
25 physician, or by an agent of either physician, at least twenty-four
26 hours before the abortion:

27 (a) The name of the physician who will perform the

1 abortion;

2 (b) That medical assistance benefits may be available for
3 prenatal care, childbirth, and neonatal care;

4 (c) That the father is liable to assist in the support of
5 her child, even in instances in which the father has offered to pay
6 for the abortion;

7 (d) That she has the right to review the printed
8 materials described in section 28-327.01. The physician or his
9 or her agent shall orally inform the woman that the materials
10 have been provided by the Department of Health and Human Services
11 and that they describe the unborn child and list agencies which
12 offer alternatives to abortion. If the woman chooses to review the
13 materials, they shall either be given to her at least twenty-four
14 hours before the abortion or mailed to her at least seventy-two
15 hours before the abortion by certified mail, restricted delivery
16 to addressee, which means the postal employee can only deliver
17 the mail to the addressee. The physician and his or her agent
18 may disassociate themselves from the materials and may comment or
19 refrain from commenting on them as they choose; and

20 (e) That she has the right to request a comprehensive
21 list, compiled by the Department of Health and Human Services,
22 of health care providers, facilities, and clinics that offer to
23 have ultrasounds performed by a person at least as qualified
24 as a registered nurse licensed under the Uniform Credentialing
25 Act, including and specifying those that offer to perform
26 such ultrasounds free of charge. The list shall be arranged
27 geographically and shall include the name, address, hours of

1 operation, and telephone number of each entity. If requested by
2 the woman, the physician who is to perform the abortion, the
3 referring physician, or his or her agent shall provide such a list
4 as compiled by the department;

5 (3) If an ultrasound is used prior to the performance
6 of an abortion, the physician who is to perform the abortion,
7 the referring physician, or a physician assistant or registered
8 nurse licensed under the Uniform Credentialing Act who is an agent
9 of either physician, or any qualified agent of either physician,
10 shall:

11 (a) Perform an ultrasound of the woman's unborn child
12 of a quality consistent with standard medical practice in the
13 community at least one hour prior to the performance of the
14 abortion;

15 (b) Simultaneously display the ultrasound images so that
16 the woman may choose to view the ultrasound images or not view the
17 ultrasound images. The woman shall be informed that the ultrasound
18 images will be displayed so that she is able to view them. Nothing
19 in this subdivision shall be construed to require the woman to view
20 the displayed ultrasound images; and

21 (c) If the woman requests information about the displayed
22 ultrasound image, her questions shall be answered. If she requests
23 a detailed, simultaneous, medical description of the ultrasound
24 image, one shall be provided that includes the dimensions of the
25 unborn child, the presence of cardiac activity, if present and
26 viewable, and the presence of external members and internal organs,
27 if present and viewable;

1 (4) At least one hour prior to the performance of an
2 abortion, a physician, psychiatrist, psychologist, mental health
3 practitioner, physician assistant, registered nurse, or social
4 worker licensed under the Uniform Credentialing Act has:

5 (a) Evaluated the pregnant woman to identify if the
6 pregnant woman had the perception of feeling pressured or coerced
7 into seeking or consenting to an abortion;

8 (b) Evaluated the pregnant woman to identify the presence
9 of any risk factors associated with abortion;

10 (c) Informed the pregnant woman and the physician who
11 is to perform the abortion of the results of the evaluation in
12 writing. The written evaluation shall include, at a minimum, a
13 checklist identifying both the positive and negative results of the
14 evaluation for each risk factor associated with abortion and both
15 the licensed person's written certification and the woman's written
16 certification that the pregnant woman was informed of the risk
17 factors associated with abortion as discussed; and

18 (d) Retained a copy of the written evaluation results in
19 the pregnant woman's permanent record;

20 (5) If any risk factors associated with abortion were
21 identified, the pregnant woman was informed of the following in
22 such manner and detail that a reasonable person would consider
23 material to a decision of undergoing an elective medical procedure:

24 (a) Each complication associated with each identified
25 risk factor; and

26 (b) Any quantifiable risk rates whenever such relevant
27 data exists;

1 (6) The physician performing the abortion has formed a
2 reasonable medical judgment, documented in the permanent record,
3 that:

4 (a) The preponderance of statistically validated medical
5 studies demonstrates that the physical, psychological, and familial
6 risks associated with abortion for patients with risk factors
7 similar to the patient's risk factors are negligible risks;

8 (b) Continuance of the pregnancy would involve risk of
9 injury to the physical or mental health of the pregnant woman
10 greater than if the pregnancy were terminated by induced abortion;
11 or

12 (c) Continuance of the pregnancy would involve less risk
13 of injury to the physical or mental health of the pregnant woman
14 than if the pregnancy were terminated by an induced abortion;

15 ~~(4)~~ (7) The woman certifies in writing, prior to the
16 abortion, that:

17 (a) The information described in subdivisions (1) and
18 (2) (a), (b), and (c) of this section has been furnished her;

19 (b) She has been informed of her right to review the
20 information referred to in subdivision (2) (d) of this section; and

21 (c) The requirements of subdivision (3) of this section
22 have been performed if an ultrasound is performed prior to the
23 performance of the abortion; and

24 ~~(5)~~ (8) Prior to the performance of the abortion,
25 the physician who is to perform the abortion or his or her
26 agent receives a copy of the written certification prescribed by
27 subdivision ~~(4)~~ (7) of this section. The physician or his or her

1 agent shall retain a copy of the signed certification form in the
2 woman's medical record.

3 Sec. 5. Any waiver of the evaluations and notices
4 provided for in subdivision (4) of section 28-327 is void and
5 unenforceable.

6 Sec. 6. In addition to whatever remedies are available
7 under the common or statutory laws of this state, the intentional,
8 knowing, or negligent failure to comply with the requirements of
9 section 28-327 shall provide a basis for the following damages:

10 (1) The award of reasonable costs and attorney's fees;
11 and

12 (2) A recovery for the pregnant woman for the wrongful
13 death of her unborn child under section 30-809 upon proving by
14 a preponderance of evidence that the physician knew or should
15 have known that the pregnant woman's consent was either not fully
16 informed or not fully voluntary pursuant to section 28-327.

17 Sec. 7. Any action for civil remedies based on a
18 failure to comply with the requirements of section 28-327 shall be
19 commenced in accordance with section 25-222 or 44-2828.

20 Sec. 8. If a physician performed an abortion on a
21 pregnant woman who is a minor without providing the information
22 required in section 28-327 to the pregnant woman's parent or legal
23 guardian, then the physician bears the burden of proving that
24 the pregnant woman was capable of independently evaluating the
25 information given to her.

26 Sec. 9. Except in the case of an emergency situation,
27 if a pregnant woman is provided with the information required by

1 section 28-327 less than twenty-four hours before her scheduled
2 abortion, the physician shall bear the burden of proving that
3 the pregnant woman had sufficient reflection time, given her age,
4 maturity, emotional state, and mental capacity, to comprehend and
5 consider such information.

6 Sec. 10. In a civil action involving section 28-327, the
7 following shall apply:

8 (1) In determining the liability of the physician and the
9 validity of the consent of a pregnant woman, the failure to comply
10 with the requirements of section 28-327 shall create a rebuttable
11 presumption that the pregnant woman would not have undergone the
12 recommended abortion had section 28-327 been complied with by the
13 physician;

14 (2) The absence of physical injury shall not preclude
15 an award of noneconomic damages including pain, suffering,
16 inconvenience, mental suffering, emotional distress, psychological
17 trauma, loss of society or companionship, loss of consortium,
18 injury to reputation, or humiliation associated with the abortion;

19 (3) The fact that a physician does not perform elective
20 abortions or has not performed elective abortions in the past
21 shall not automatically disqualify such physician from being an
22 expert witness. A licensed obstetrician or family practitioner
23 who regularly assists pregnant women in resolving medical matters
24 related to pregnancy may be qualified to testify as an expert
25 on the screening, counseling, management, and treatment of
26 pregnancies;

27 (4) Any physician advertising services in this state

1 shall be deemed to be transacting business in this state pursuant
2 to section 25-536 and shall be subject to the provisions of section
3 28-327;

4 (5) It shall be an affirmative defense to an allegation
5 of inadequate disclosure under the requirements of section 28-327
6 that the defendant omitted the contested information because
7 statistically validated surveys of the general population of women
8 of reproductive age, conducted within the three years before or
9 after the contested abortion, demonstrate that less than five
10 percent of women would consider the contested information to be
11 relevant to an abortion decision; and

12 (6) In addition to the other remedies available under the
13 common or statutory law of this state, a woman or her survivors
14 shall have a cause of action for reckless endangerment against any
15 person, other than a physician or pharmacist licensed under the
16 Uniform Credentialing Act, who attempts or completes an abortion
17 on the pregnant woman or aids or abets the commission of a
18 self-induced abortion. Proof of injury shall not be required to
19 recover an award, including reasonable costs and attorney's fees,
20 for wrongful death under this subdivision.

21 Sec. 11. (1) In the event that any portion of section
22 28-327 is enjoined and subsequently upheld, the statute of
23 limitations for filing a civil suit under section 28-327 shall
24 be tolled during the period for which the injunction is pending and
25 for two years thereafter.

26 (2) Nothing in section 28-327 shall be construed as
27 defining a standard of care for any medical procedure other than an

1 induced abortion.

2 (3) A violation of subdivision (4), (5), or (6) of
3 section 28-327 shall not provide grounds for any criminal action or
4 disciplinary action against or revocation of a license to practice
5 medicine and surgery pursuant to the Uniform Credentialing Act.

6 Sec. 12. Section 28-327.03, Revised Statutes Supplement,
7 2009, is amended to read:

8 28-327.03 No civil liability for failure to comply with
9 subdivision (2) (d) of section 28-327 or that portion of subdivision
10 ~~(4)~~ (7) of such section requiring a written certification that the
11 woman has been informed of her right to review the information
12 referred to in subdivision (2) (d) of such section may be imposed
13 unless the Department of Health and Human Services has published
14 and made available the printed materials at the time the physician
15 or his or her agent is required to inform the woman of her right
16 to review them.

17 Sec. 13. Section 28-327.04, Revised Statutes Supplement,
18 2009, is amended to read:

19 28-327.04 Any person upon whom an abortion has been
20 performed or attempted in violation of section 28-327 or the parent
21 or guardian of a minor upon whom an abortion has been performed
22 or attempted in violation of such section shall have a right to
23 maintain a civil cause of action against the person who performed
24 the abortion or attempted to perform the abortion. A violation
25 of such section shall be prima facie evidence of professional
26 negligence. The written certification prescribed by subdivision ~~(4)~~
27 (7) of section 28-327 signed by the person upon whom an abortion

1 has been performed or attempted shall constitute and create a
2 rebuttable presumption of full compliance with all provisions of
3 section 28-327 in favor of the physician who performed or attempted
4 to perform the abortion, the referring physician, or the agent
5 of either physician. The written certification shall be admissible
6 as evidence in the cause of action for professional negligence or
7 in any criminal action. If judgment is rendered in favor of the
8 plaintiff in any such action, the court shall also render judgment
9 for a reasonable attorney's fee in favor of the plaintiff against
10 the defendant.

11 Sec. 14. Section 28-340, Reissue Revised Statutes of
12 Nebraska, is amended to read:

13 28-340 Any person whose employment or position has been
14 in any way altered, impaired, or terminated in violation of
15 sections 28-325 to 28-345 and sections 5 to 11 of this act may sue
16 in the district court for all consequential damages, lost wages,
17 reasonable attorney's fees incurred, and the cost of litigation.

18 Sec. 15. Section 38-2021, Reissue Revised Statutes of
19 Nebraska, is amended to read:

20 38-2021 Unprofessional conduct means any departure from
21 or failure to conform to the standards of acceptable and prevailing
22 practice of medicine and surgery or the ethics of the profession,
23 regardless of whether a person, patient, or entity is injured, or
24 conduct that is likely to deceive or defraud the public or is
25 detrimental to the public interest, including, but not limited to:

26 (1) Performance by a physician of an abortion as defined
27 in subdivision (1) of section 28-326 under circumstances when he

1 or she will not be available for a period of at least forty-eight
2 hours for postoperative care unless such postoperative care is
3 delegated to and accepted by another physician;

4 (2) Performing an abortion upon a minor without having
5 satisfied the notice requirements of sections 71-6901 to 71-6908;
6 and

7 (3) The intentional and knowing performance of a
8 partial-birth abortion as defined in subdivision ~~(9)~~ (7) of section
9 28-326, unless such procedure is necessary to save the life of the
10 mother whose life is endangered by a physical disorder, physical
11 illness, or physical injury, including a life-endangering physical
12 condition caused by or arising from the pregnancy itself.

13 Sec. 16. If any section in this act or any part of any
14 section is declared invalid or unconstitutional, the declaration
15 shall not affect the validity or constitutionality of the remaining
16 portions.

17 Sec. 17. Original sections 28-325, 28-340, and 38-2021,
18 Reissue Revised Statutes of Nebraska, and sections 28-101, 28-326,
19 28-327, 28-327.03, and 28-327.04, Revised Statutes Supplement,
20 2009, are repealed.

21 2. On page 1, strike beginning with "adopt" in line
22 1 through line 2 and insert "amend sections 28-325, 28-340,
23 and 38-2021, Reissue Revised Statutes of Nebraska, and sections
24 28-101, 28-326, 28-327, 28-327.03, and 28-327.04, Revised Statutes
25 Supplement, 2009; to state and restate legislative findings and
26 declarations; to define and redefine terms; to change provisions
27 relating to voluntary and informed consent to an abortion; to

1 prohibit waivers, provide additional remedies, provide requirements
2 for certain civil actions, provide burdens of proof, provide for
3 tolling statute of limitations, and restrict applicability to
4 criminal and disciplinary actions; to harmonize provisions; to
5 provide severability; and to repeal the original sections."