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ABORTION AMENDMENTS

2016 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Curtis Oda

Senate Sponsor: _____

LONG TITLE

General Description:

This bill enacts and modifies sections of the Utah Criminal Code related to abortion.

Highlighted Provisions:

This bill:

- ▶ enacts a definition of "dismemberment abortion";
- ▶ prohibits a physician from performing or attempting to perform a dismemberment abortion; and
- ▶ provides causes of action against a physician for performing a dismemberment abortion.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

- 76-7-301**, as last amended by Laws of Utah 2010, Chapter 13
- 76-7-314**, as last amended by Laws of Utah 2010, Chapter 13
- 76-7-327**, as last amended by Laws of Utah 2010, Chapter 13
- 76-7-328**, as enacted by Laws of Utah 2004, Chapter 272

ENACTS:



- 28 [76-7-332](#), Utah Code Annotated 1953
- 29 [76-7-333](#), Utah Code Annotated 1953
- 30 [76-7-334](#), Utah Code Annotated 1953
- 31 [76-7-335](#), Utah Code Annotated 1953



33 *Be it enacted by the Legislature of the state of Utah:*

34 Section 1. Section **76-7-301** is amended to read:

35 **76-7-301. Definitions.**

36 As used in this part:

37 (1) (a) "Abortion" means:

38 (i) the intentional termination or attempted termination of human pregnancy after
39 implantation of a fertilized ovum through a medical procedure carried out by a physician or
40 through a substance used under the direction of a physician;

41 (ii) the intentional killing or attempted killing of a live unborn child through a medical
42 procedure carried out by a physician or through a substance used under the direction of a
43 physician; or

44 (iii) the intentional causing or attempted causing of a miscarriage through a medical
45 procedure carried out by a physician or through a substance used under the direction of a
46 physician.

47 (b) "Abortion" does not include:

48 (i) removal of a dead unborn child;

49 (ii) removal of an ectopic pregnancy; or

50 (iii) the killing or attempted killing of an unborn child without the consent of the
51 pregnant woman, unless:

52 (A) the killing or attempted killing is done through a medical procedure carried out by
53 a physician or through a substance used under the direction of a physician; and

54 (B) the physician is unable to obtain the consent due to a medical emergency.

55 (2) (a) "Dismemberment abortion" means:

56 (i) an abortion in which the physician deliberately and intentionally dismembers a
57 living unborn child and extracts the unborn child one piece at a time from the uterus through
58 the use of clamps, grasping forceps, tongs, scissors, or similar instruments that, through the

59 convergence of two rigid levers, slice, crush, or grab a portion of the unborn child's body in
60 order to cut or rip the portion off; or

61 (ii) an abortion in which the physician uses suction to dismember the body of the
62 unborn child by sucking fetal parts into a collection container.

63 (b) "Dismemberment abortion" includes the following procedures:

64 (i) dilation and evacuation;

65 (ii) suction and curettage; or

66 (iii) suction aspiration.

67 ~~[(5)]~~ (3) "Hospital" means:

68 (a) a general hospital licensed by the Department of Health according to Title 26,
69 Chapter 21, Health Care Facility Licensing and Inspection Act; and

70 (b) a clinic or other medical facility to the extent that such clinic or other medical
71 facility is certified by the Department of Health as providing equipment and personnel
72 sufficient in quantity and quality to provide the same degree of safety to the pregnant woman
73 and the unborn child as would be provided for the particular medical procedures undertaken by
74 a general hospital licensed by the Department of Health.

75 ~~[(2)]~~ (4) "Medical emergency" means that condition which, on the basis of the
76 physician's good faith clinical judgment, so threatens the life of a pregnant woman as to
77 necessitate the immediate abortion of her pregnancy to avert her death, or for which a delay
78 will create serious risk of substantial and irreversible impairment of a major bodily function.

79 ~~[(3)]~~ (5) (a) "Partial birth abortion" means an abortion in which the person performing
80 the abortion:

81 (i) deliberately and intentionally vaginally delivers a living fetus until, in the case of a
82 head first presentation, the entire fetal head is outside the body of the mother, or, in the case of
83 breech presentation, any part of the fetal trunk past the navel is outside the body of the mother,
84 for the purpose of performing an overt act that the person knows will kill the partially delivered
85 living fetus; and

86 (ii) performs the overt act, other than completion of delivery, that kills the partially
87 living fetus.

88 (b) "Partial birth abortion" does not include the dilation and evacuation procedure
89 involving dismemberment prior to removal, the suction curettage procedure, or the suction

90 aspiration procedure for abortion.

91 [~~(4)~~] (6) "Physician" means:

92 (a) a medical doctor licensed to practice medicine and surgery under Title 58, Chapter
93 67, Utah Medical Practice Act;

94 (b) an osteopathic physician licensed to practice osteopathic medicine under Title 58,
95 Chapter 68, Utah Osteopathic Medical Practice Act; or

96 (c) a physician employed by the federal government who has qualifications similar to a
97 person described in Subsection [~~(4)~~] (6)(a) or (b).

98 Section 2. Section 76-7-314 is amended to read:

99 **76-7-314. Violations of abortion laws -- Classifications.**

100 (1) A willful violation of Section 76-7-307, 76-7-308, 76-7-310, 76-7-310.5, 76-7-311,
101 or 76-7-312 is a felony of the third degree.

102 (2) A violation of Section 76-7-326 or 76-7-332 is a felony of the third degree.

103 (3) A violation of Section 76-7-314.5 is a felony of the second degree.

104 (4) A violation of any other provision of this part is a class A misdemeanor.

105 Section 3. Section 76-7-327 is amended to read:

106 **76-7-327. Remedies for father or maternal grandparents.**

107 (1) The father, if married to the mother at the time she receives a partial birth abortion
108 or a dismemberment abortion, and if the mother has not attained the age of 18 years at the time
109 of the abortion, the maternal grandparents of the fetus, may in a civil action obtain appropriate
110 relief, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff
111 consented to the abortion.

112 (2) Such relief shall include:

113 (a) money damages for all injuries, psychological and physical, occasioned by the
114 violation of Section 76-7-326 or 76-7-332; and

115 (b) statutory damages equal to three times the cost of the partial birth abortion or the
116 dismemberment abortion.

117 Section 4. Section 76-7-328 is amended to read:

118 **76-7-328. Hearing to determine necessity of physician's conduct.**

119 (1) A physician accused of an offense under Section 76-7-326 or 76-7-332 may seek a
120 hearing before the Physicians Licensing Board created in Section 58-67-201, or the Osteopathic

121 Physician and Surgeon's Licensing Board created in Section [58-68-201](#) on whether the
122 physician's conduct was necessary to save the life of the mother whose life was endangered by
123 a physical disorder, physical illness, or physical injury, including a life endangering physical
124 condition caused by or arising from the pregnancy itself.

125 (2) The findings on that issue are admissible on that issue at the trial of the physician.
126 Upon a motion from the physician, the court shall delay the beginning of the trial for not more
127 than 30 days to permit such a hearing to take place.

128 Section 5. Section [76-7-332](#) is enacted to read:

129 **76-7-332. Dismemberment abortion prohibited -- Exception.**

130 (1) (a) Any physician who performs, or attempts to perform, a dismemberment
131 abortion on an unborn child is guilty of a felony of the third degree, unless the dismemberment
132 abortion is performed in a medical emergency.

133 (b) For purposes of this section, "medical emergency," as defined in Section [76-7-301](#),
134 does not mean a medical emergency based on a claim or diagnosis that the woman will engage
135 in conduct that would result in her death or in serious risk of substantial and irreversible
136 impairment of a major bodily function.

137 (2) The following individuals are not liable for performing or attempting to perform a
138 dismemberment abortion:

139 (a) a woman upon whom a dismemberment abortion is performed or attempted to be
140 performed;

141 (b) a nurse, technician, secretary, receptionist, or other employee or agent who is not a
142 physician, but who acts at the direction of a physician; or

143 (c) a pharmacist or other individual who is not a physician who fills a prescription or
144 provides instruments or materials used in a dismemberment abortion.

145 Section 6. Section [76-7-333](#) is enacted to read:

146 **76-7-333. Cause of action for injunctive relief.**

147 (1) The following individuals may bring a cause of action for injunctive relief against a
148 physician who has performed or attempted to perform a dismemberment abortion in violation
149 of Section [76-7-332](#):

150 (a) the attorney general, a district attorney, or a county attorney with appropriate
151 jurisdiction; or

152 (b) a woman, or the spouse, parent, guardian, or current or former licensed health care
153 provider of the woman, upon whom the dismemberment abortion was performed or attempted
154 to be performed.

155 (2) The injunction shall prevent the physician from performing or attempting to
156 perform further dismemberment abortions in violation of Section [76-7-332](#).

157 Section 7. Section **76-7-334** is enacted to read:

158 **76-7-334. Cause of action for civil damages.**

159 (1) A woman upon whom a dismemberment abortion has been performed may bring a
160 cause of action against a physician who has performed a dismemberment abortion in violation
161 of Section [76-7-332](#).

162 (2) Damages awarded in the action shall include:

163 (a) money damages for all injuries, psychological and physical, occasioned by the
164 dismemberment abortion; and

165 (b) statutory damages equal to three times the cost of the dismemberment abortion.

166 Section 8. Section **76-7-335** is enacted to read:

167 **76-7-335. Court order regarding anonymity.**

168 In a civil action or criminal proceeding arising out of a violation described in Section
169 [76-7-327](#), [76-7-332](#), [76-7-333](#), or [76-7-334](#) the court shall seal the court documents to preserve
170 a woman's anonymity unless the woman upon whom a dismemberment abortion was
171 performed consents to the disclosure of her identity.

Legislative Review Note

The Utah Legislature's Joint Rule 4-2-402 requires legislative general counsel to place a legislative review note on legislation. The Legislative Management Committee has further directed legislative general counsel to include legal analysis in the legislative review note only if legislative general counsel determines there is a high probability that a court would declare the legislation to be unconstitutional under the Utah Constitution, the United States Constitution, or both. As explained in the legal analysis below, legislative general counsel has determined, based on applicable state and federal constitutional language and current interpretations of that language in state and federal court case law, that this legislation has a high probability of being declared unconstitutional by a court.

This bill prohibits a "dismemberment abortion" procedure, which includes procedures known as dilation and evacuation (D & E), suction curettage, and suction aspiration. This bill prohibits

dismemberment abortion whether the abortion is performed before or after the unborn child has attained viability.

The United States Supreme Court has held that a woman has a constitutional right to terminate her pregnancy before viability. Roe v. Wade, 410 U.S. 113, 163–65 (1973); Planned Parenthood v. Casey, 505 U.S. 833, 846, 879 (1992); Gonzales v. Carhart, 550 U.S. 124, 146 (2007). "Viability" is defined as "a reasonable likelihood of the fetus's sustained survival outside the womb, with or without artificial support." Colautti v. Franklin, 439 U.S. 379, 388 (1979). Specifically, the Supreme Court has held that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." Casey, 505 U.S. at 860.

The Supreme Court has also held that states have "a substantial interest in potential life" throughout a woman's pregnancy and may express "profound respect" for unborn life in regulating abortion. Id. at 876-77. However, the Supreme Court has been clear that, before viability, a state may not impose an undue burden upon a woman's right to terminate her pregnancy. Gonzales, 550 U.S. at 146. An undue burden exists "when a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Casey, 505 U.S. at 877.

In Stenberg v. Carhart, 530 U.S. 914 (2000), the Supreme Court held that a Nebraska statute that prohibited the performance of "partial birth" abortions was unconstitutional for two independent reasons. Id. at 930. First, the Court determined that the law failed to include an exception to protect the health of the mother. Id. at 938. Second, the Court determined that the partial birth abortion prohibition applied to a D & E procedure as well as a dilation and extraction (D & X) procedure, and that, because it prohibited D & E, "the most commonly used method for performing previability second trimester abortions," it created "an undue burden upon a woman's right to make an abortion decision." Id. at 945-46.

In Gonzales v. Carhart, 550 U.S. 124 (2007), the Supreme Court upheld the Federal Partial Birth Abortion Ban Act, which prohibited a "partial birth," or D & X, abortion procedure. Id. at 156. The Court reasoned that there was medical uncertainty about whether the banned procedure, D & X, was the safest method of abortion. Id. 162-64. The Court stated that states have a legitimate interest in showing "profound respect for the life within the woman" in its regulations, including in regulating the medical profession. Id. at 157. The Court also determined that, because there were alternative procedures still available to women, such as D & E--"a commonly used and generally accepted method"--the Partial Birth Abortion Ban Act "did not construct a substantial obstacle to the abortion right." Id. at 164.

Utah statutes currently prohibit the partial birth (D & X) abortion procedure. This bill prohibits D & E, which the Supreme Court has held is a commonly used and generally accepted method of abortion in the second trimester. While there may be other abortion alternatives to D & E available, the Supreme Court has directly held that a prohibition of both the D & X and the D & E procedures presented an undue burden on the right of a woman to terminate her pregnancy before viability. This bill also prohibits procedures known as suction curettage and suction aspiration, which may be used in the second trimester, although less commonly than D & E.

The prohibition of these procedures, as well as the D & X and D & E procedures, creates an even greater undue burden on a woman's right to terminate her pregnancy before viability during the second trimester. Based on this precedent, there is a high probability that a court would hold that this bill unduly burdens a woman's right to a previability abortion.

This bill also prohibits certain abortion procedures--suction curettage and suction aspiration--during the first trimester. Suction curettage and suction aspiration are generally the most common abortion procedures used to terminate pregnancies during the first trimester. Stenberg, 530 U.S. at 924; Gonzales, 550 U.S. at 134. Assuming a court follows and applies the holdings and reasoning from Stenberg and Gonzales, there is a high probability that the court would find that the prohibition of those abortion procedures creates an undue burden on a woman's right to terminate her pregnancy before viability during the first trimester.

Office of Legislative Research and General Counsel