

SESSION OF 2023

SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2313

As Amended by Senate Committee on Public
Health and Welfare

Brief*

HB 2313, as amended, would enact the Born-alive Infants Protection Act (Act).

Definitions (New Sections 2 and 3)

The bill would define terms as follows:

- “Abortion” would mean 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;
- “Born alive” would mean the complete expulsion or extraction of a human being from its mother, at any stage of development, who, after such expulsion or extraction, breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut and regardless of whether the expulsion or extraction

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

occurs as a result of natural or induced labor, cesarean section, or induced abortion;

- “Healthcare provider” would mean a physician, licensed physician assistant, licensed advanced practice registered nurse, or person licensed, registered, certified, or otherwise authorized to practice by the Behavioral Sciences Regulatory Board; and
- “Medical care facility” would mean a hospital, ambulatory surgical center, or recuperation center, except that “medical care facility” would not include a hospice that is certified to participate in the Medicare program and that provides services only to hospice patients.

The bill would also specify that the definitions of terms “child,” “human being,” or “person” would include each member of the species *Homo sapiens* who is born alive.

Requirements for Health Care Providers (New Section 4)

The bill would require, in the event an abortion or attempted abortion results in a child being born alive, any health care provider present at the time the child is born alive to:

- Exercise the same degree of professional skill, care, and diligence, to preserve the life and health of the child as a reasonably diligent and conscientious health care provider would render to any other child born alive at the same gestational age; and
- Ensure that the child who is born alive is immediately transported to a hospital.

The bill would require any health care provider or any employee of a medical care facility who has knowledge of a

failure to comply with the reporting requirements to immediately report such failure to an appropriate law enforcement agency.

Penalties (New Section 5)

The bill would provide for any person who knowingly or recklessly violates the requirements for care and reporting to be guilty of a severity level 10, nonperson felony.

Any person who intentionally performs or attempts to perform an overt act that kills a child who is born alive during an abortion or attempted abortion would be guilty of a severity level 1, person felony.

The provisions of this section would not apply to the woman upon whom the abortion is performed or attempted.

Civil Action (New Section 6)

The bill would provide that a civil action with appropriate relief for any violation of the requirements for care and reporting could only be filed by the woman upon whom the abortion or attempted abortion was performed; the father of the child born alive; and, if the woman is not at least 18 years of age at the time the abortion or attempted abortion is performed, the parents or custodial guardian of the woman.

The bill would bar from bringing an action any person who is not the woman upon whom the abortion or attempted abortion was performed if the pregnancy resulted from such person's criminal conduct.

The bill would provide for the prevailing party to be awarded reasonable attorney fees, except when the prevailing party is the defendant. If the defendant prevails, the court would find that the plaintiff's action was frivolous and

brought in bad faith before the court and could award attorney fees to such defendant.

Anonymity and Requirements to Prevent Public Disclosure (New Section 7)

In any civil or criminal action brought pursuant to New Section 5 or 6, upon a motion by either party or on the court's own accord, the bill would direct the court to determine whether the anonymity of such woman would be preserved.

If the court determines the woman's anonymity should be preserved, the bill would direct the court to issue appropriate orders to the parties, witnesses, and counsel and would direct that court records of the proceedings be sealed and all individuals who are not a party to the action, witnesses, or counsel be excluded from the courtroom or hearing room to the extent necessary to safeguard the woman's identity from public disclosure. The bill would require each order to 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.

The bill would specify that this section should not be construed to conceal the identity of the plaintiff or of witnesses from the defendant.

Annual Report (New Section 8)

The bill would require medical care facilities in which an infant is born alive subsequent to an abortion or attempted abortion performed on the mother of the infant to submit an annual report to the Secretary of Health and Environment (Secretary).

The bill would require the report to include these specific items:

- The number of infants born alive subsequent to an abortion or attempted abortion;
- The approximate gestational age of the infant who was born alive expressed in one of the following increments:
 - Less than 9 weeks;
 - 9 to 10 weeks;
 - 11 to 12 weeks;
 - 13 to 15 weeks;
 - 16 to 20 weeks;
 - 21 to 24 weeks;
 - 25 to 30 weeks;
 - 31 to 36 weeks; or
 - 37 weeks to term;
- Any medical actions taken to preserve the life of the infant who was born alive;
- The outcome for such infants, including survival, death, and location of death, such as a clinic, hospital, or ambulance, if known; and
- The medical conditions of infants who were born alive, including conditions developed prior to and after the attempted abortion.

The bill would authorize the Secretary to impose a civil fine in any amount not to exceed \$500 on any medical care facility that fails to submit the required report within 30 days after the date such report is due to be submitted to the Secretary.

The bill would authorize the Secretary to impose an additional civil fine in an amount not to exceed \$500 for each additional 30-day period that such medical care facility fails to submit the required report. If a medical care facility fails to submit a required report for more than one year following the due date, or submits an incomplete report during such time period and fails to correct the deficiencies in such report, the Secretary would be authorized to bring a civil action for an injunction to compel such medical care facility to submit the required report.

Severability (New Section 9)

The bill would declare the provisions, words, phrases, and clauses of New Sections 1 through 8 to be severable, and provide that if any provision, word, phrase, or clause of the bill or the application of the bill to any person or circumstance is held invalid, the unaffected provisions, words, phrases, clauses, or applications would still be effective.

Reporting and Sunset on Disclosure Exclusion (Section 10)

The bill would amend a statute regarding reporting of the number of pregnancies lawfully terminated to the Secretary to add information required to be reported under New Section 8 of the Act and specify the report would not include the names of persons upon whom an attempted abortion was performed.

The bill would also add a sunset date of July 1, 2028, for the subsection providing for the confidentiality of information obtained by the Secretary and prohibiting disclosure in a

manner that would reveal the identity of physicians or county or other area of the state reporting to the Secretary. The Legislature would be able to review and reenact such provisions before July 1, 2028.

Background

The bill was introduced by Representative Sanders and 52 others.

House Committee on Human Services

In the House Committee hearing on March 8, 2023, **proponent** testimony was provided by Representative Bryce, a representative of Kansans for Life, a physician, and a private citizen, who generally stated the need to establish a legal responsibility similar to that for other medical situations so that when complications or unexpected medical events occur, the patient (infant) receives the appropriate medical care for their medical needs which includes palliative/end of life care as well as more intensive medical interventions.

Written-only proponent testimony was provided by representatives of Abortion Survivors Network, Kansas Catholic Conference, and Kansas Family Voice and a private citizen.

Written-only **opponent** testimony was provided by the American Civil Liberties Union of Kansas.

No other testimony was provided.

Senate Committee on Public Health and Welfare

At the Senate Committee hearing on March 24, 2023, **proponent** testimony was provided by a representative of Kansans for Life and a private citizen. The proponents provided substantially similar testimony as in the House Committee hearing.

Written-only proponent testimony was provided by Representative Bryce, a pediatrician, and representatives of Abortion Survivors Network, Kansas Catholic Conference, and Kansas Family Voice.

No other testimony was provided.

The Senate Committee amended the bill to remove the requirement that the health care providers present at the time the child is born alive ensure the child is immediately admitted to a hospital after ensuring immediate transportation of the child to a hospital.

Fiscal Information

According to the fiscal note prepared by the Division of the Budget on the bill, as introduced, the State Board of Healing Arts indicates enactment of the bill could result in an increase in complaints, investigations, and potential litigation but the additional workload would be managed within existing resources.

The Office of the Attorney General reports that the bill is likely to be challenged on constitutional grounds in state court. The litigation could be ongoing and would be likely to reach the appellate level. The Office is unable to determine the amount of additional workload resulting from enactment of the bill but anticipates handling within existing resources.

The Office of Judicial Administration states enactment of the bill could increase the number of cases filed in district

court because it allows for civil actions and creates new crimes, which could result in more time spent by judicial and nonjudicial personnel processing, researching, and hearing cases. The Office estimates enactment of the bill could result in the collection of docket fees and fines assessed in those cases filed under the bill's provisions. According to the Office, a fiscal effect cannot be estimated.

The Department of Health and Environment and the Department for Children and Families report that enactment of the bill would not have a fiscal effect on agency operations.

Any fiscal effect associated with enactment of the bill is not reflected in *The FY 2024 Governor's Budget Report*.

Born-alive Infants Protection Act; infants; abortion; health; standard of care; criminal penalties; civil liability