

No. 117439

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IN THE COURT OF APPEALS OF THE STATE OF KANSAS

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ALYSIA R. TILLMAN and  
STORM FLEETWOOD,

Plaintiffs-Appellants,

v.

KATHERINE A. GOODPASTURE, D.O.,

Defendant-Appellee.

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SUPPLEMENTAL BRIEF OF APPELLANTS

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APPEAL FROM THE DISTRICT COURT OF RILEY COUNTY,  
HONORABLE JOHN F. BOSCH, JUDGE,  
DISTRICT COURT CASE NO. 16-CV-000094

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## **INTRODUCTION**

By an Order dated February 21, 2018, the parties were directed by Presiding Judge Schroeder to submit supplemental briefing limited to whether there are Kansas statutes that provide an adequate and viable substitute remedy to replace K.S.A. 60-1906's elimination of Plaintiffs' common-law medical negligence wrongful birth cause of action and Plaintiffs' Section 5 and Section 18 constitutional rights to trial by jury and right to remedy by due course of law. This Supplemental Brief is filed pursuant to the February 21, 2018 Order.

Plaintiffs, in this Supplemental Brief, first focuses on the required application of the *quid pro quo* analysis or test to Section 5 and Section 18 constitutional challenges to statutes that eliminate or modify actions at common-law for money damages (Section I) and the Two Step analysis required by the *quid pro quo* test (Sections II and III). Secondly, based on the request during oral argument that the parties consider K.S.A. 59-2124 and K.S.A. 38-2282 as statutes that may possibly provide an "adequate substitute statutory remedy" for the rights eliminated by K.S.A. 60-1906, Plaintiffs have addressed those two statutes in light of the basic fundamental parental rights that are protected by the Fourteenth Amendment of the United States Constitution (Section IV). Finally, Plaintiffs' address the Kansas Supreme Court opinions that have found an "adequate substitute statutory remedy" in statutes that are part of the same comprehensive statutory scheme that modified or eliminated a common-law remedy and jury trial right (Section V).

## **ARGUMENTS AND AUTHORITIES**

### **I. Section 5 and 18 *quid pro quo* Analysis**

The Kansas Supreme Court, in Miller v. Johnson, 295 Kan. 636, 653-657 (2012), determined that the *quid pro quo* analysis should apply to both Section 5 and Section 18

constitutional challenges to specific statutes that eliminate or modify actions at common-law seeking money damages. The *quid pro quo* analysis to be applied by the Court when there is a Section 5 and/or Section 18 constitutional challenge to a specific statute is a two-step process as defined by the Miller Court:

A two-step analysis is required for the *quid pro quo* test. For step one, we determine whether the modification to the common-law remedy or the right to jury trial is reasonably necessary in the public interest to promote the public welfare. This first step is similar to the analysis used to decide equal protection questions under the rational basis standard. Lemuz, 261 Kan. at 948, 933 P.2d 134. For step two, we determine whether the legislature substituted an adequate statutory remedy for the modification to the individual right at issue. This step is more stringent than the first because even if a statute is consistent with public policy, there still must be an adequate substitute remedy conferred on those individuals whose rights are adversely impacted. Lemuz, 261 Kan. at 948, 933 P.2d 134; Bonin, 261 Kan. at 217-18, 929 P.2d 754; Aves v. Shah, 258 Kan. 506, 521-22, 906 P.2d 642 (1995); Samsel II, 246 Kan. at 358, 361, 789 P.2d 541; Manzanares, 214 Kan. at 599, 522 P.2d 1291.

Id. at 657

## **II. Step One Analysis/Determination**

The Step One analysis requires that this Court determine whether the modification to the common-law remedy or the right to jury trial is reasonably necessary in the public interest to promote the public welfare. In this specific case the statute at issue, K.S.A. 60-1906, does not merely modify a common-law remedy or right to jury trial; but rather, it eliminates a common-law remedy and eliminates the right to jury trial. Thus, in this specific case, this Court must determine whether K.S.A. 60-1906's elimination of a common-law remedy and elimination of the right to trial by jury is "reasonably necessary in the public interest to promote the public welfare."

This 'Step One' determination is similar to deciding whether a statute meets the equal protection requirements of Section 1 of the Bill of Rights of the Kansas Constitution by applying the level of scrutiny known as the rational basis standard or test. Lemuz v. Fieser,

261 Kan. 936, 948 (1997). The rational basis test gives significant deference to the legislature if the statute in question furthers a “legitimate legislative purpose”. In the Matter of Weisgerber, 285 Kan. 98, 103-106 (2007).

The issue here is what is the legitimate legislative purpose of K.S.A. 60-1906—what is the public welfare being promoted by K.S.A. 60-1906. This is not readily apparent by reading the statute which is identified as an “act concerning abortion.” It has to be assumed that the statute is intended to discourage the legal and constitutionally protected medical procedure known as abortion. Is discouraging abortions a valid legislative purpose that is in the public interest to promote the public welfare. It is Plaintiffs’ position that discouraging legal and constitutionally protected abortion is not a valid legislative purpose that justifies eliminating Plaintiffs’ common-law remedy and right to trial by jury.

### **III. Step Two Analysis/Determination**

If this Court rejects Plaintiffs’ argument and determines that K.S.A. 60-1906’s elimination of a common-law remedy and right to jury trial is reasonably necessary in the public interest to promote the public welfare, this Court must then apply the more stringent Step Two analysis of the *quid pro quo* test to determine if the legislature has provided an “adequate substitute statutory remedy” for the elimination of Plaintiffs’ common-law remedy and right to jury trial.

This analysis requires that this Court determine whether the legislature substituted an “adequate statutory remedy” for the complete elimination of the individual right at issue—the complete elimination/prohibition of Plaintiffs’ recognized common-law civil cause of action to recovery money damages—by the enactment of 2013 Kansas Senate Bill No. 142 which resulted in K.S.A. 60-1906 becoming law on July 1, 2013.

In this Court’s Step Two analysis, it must consider the “extent” of Plaintiffs’ “loss” or “deprivation” caused by K.S.A. 60-1906. In Miller, the Kansas Supreme Court began its ‘Step Two’ analysis by “considering what Miller has lost and try to put that loss in perspective with our prior caselaw and the legislation that impacts her recovery in this litigation. For Miller, the noneconomic damages cap unquestionably functions to deprive her of a portion of her noneconomic damages, which the jury awarded based upon the evidence presented at trial. Miller’s loss must be viewed as being significantly more serious than deprivations found in some of our cases that previously embarked on the quid pro quo analysis.” Miller, 295 Kan. at 660. The Miller Court went on to state: “Therefore, the deprivation caused by K.S.A. 60-19a02, although very real, is limited in its scope. This is a substantial consideration when deciding how adequate the substitute remedy provided by the legislature must be.” Miller, 295 Kan. at 661. The Miller opinion determined that the legislature substituted an adequate statutory remedy when the statute at issue “modifies” or “dilutes” or “adversely impacts” the constitutional protections of Section 5 and Section 18—in this case the statute at issue, K.S.A. 60-1906, does not merely “modify” or “dilute” or “adversely impact” the constitutional protections of Section 5 and Section 18, but rather the statute at issue completely eliminates for the Plaintiffs their constitutional protections guaranteed by Section 5 and Section 18. This clearly impacts and must be a “substantial consideration” in this Court’s determination of “how adequate the substitute remedy provided by the legislature must be”—assuming that the legislature made any attempt to enact any substitute adequate statutory remedy. The adequacy of any statute that is being considered as being a substitute adequate statutory remedy for the elimination of Plaintiffs’ recognized common-law civil cause of action to recovery money damages and the elimination of Plaintiffs’ constitutional protections guaranteed by Section 5

and Section 18 must not be evaluated based on the statute in question merely “modifying” or “diluting” or “adversely impacting” the rights at issue but rather must be evaluated based on the statute in question completely eliminating the rights at issue!

In this Court’s ‘Step Two’ analysis, it should consider the definition of “remedy”, “adequate” and “substitute” in order to determine if the legislature substituted an adequate statutory remedy for the elimination of the rights at issue by K.S.A. 60-1906. The first term is “substitute” or “substituted”, meaning “a person or thing that takes the place or function of another” or merely “replace” (Merriam-Webster Dictionary). The term “remedy” is defined as “The means of enforcing a right or preventing or redressing a wrong; legal or equitable relief.” Black’s Law Dictionary (10th ed. 2014). The Kansas Supreme Court has defined “remedy” in its legal sense “as the judicial means or method for enforcing a right or redressing a wrong.” Neely v. St. Francis Hospital & School of Nursing, Inc. 192 Kan. 716, 720 (1964). The Kansas Supreme Court also defined “remedy” in Kansas Malpractice Victims Coalition v. Bell: “The term remedy was defined in Hanson v. Krehbiel, 68 Kan. 670, Syl. 2, 75 P. 1041 (1904), as follows: ‘Remedy by due course of law, as used in section 18 of the bill of rights, means the reparation for injury, ordered by a tribunal having jurisdiction, in due course of procedure and after a fair hearing.’” 243 Kan. 333, 346 (1988) See also, Miller, 295 Kan. at 655 The term “adequate” is defined as “legally sufficient”. Black’s Law Dictionary (10th ed. 2014).

Thus, any statute that is being considered as an “adequate substitute statutory remedy” must be a statute that provides a “remedy”—“a judicial means or method for enforcing a right or preventing or redressing a wrong”. Not only must the statute being considered as an “adequate substitute statutory remedy” provide a “remedy” as defined by Kansas law, it must



be an “adequate statutory remedy”—a statutory remedy that is “legally sufficient” to “replace” the rights eliminated by, in this case, K.S.A. 60-1906. The “adequate substitute statutory remedy” must be a “remedy” that is “legally sufficient” to replace the right at issue that is completely eliminated—not just a “remedy” that is “legally sufficient” to replace the right at issue that is merely “modified” or “diluted” or “adversely impacted”.

As the Kansas Supreme Court has cautioned: “The provisions in Section 18 of the Bill of Rights of the Kansas Constitution guaranteeing to persons a remedy by due course of law cannot be watered down by diluting the definition of ‘remedy’” Neely, 192 Kan. at 720-721. This Court, in its ‘Step Two’ analysis must not “water down” the Section 18 and Section 5 constitutional rights guaranteed to all persons by diluting the definition of “remedy”. Any statute that is being considered as a potential “adequate substitute statutory remedy” for the rights eliminated by K.S.A. 60-1906 must provide a replacement legally sufficient remedy—a replacement with legally sufficient judicial means or methods of enforcing a right or redressing a wrong!

The legislature has not enacted any legislation that provides an adequate substitute remedy for K.S.A. 60-1906’s elimination/prohibition of a recognized common-law civil cause of action to recover money damages and elimination of the constitutionally guaranteed right to trial by jury and right to remedy by due course of law. The enactment of K.S.A. 60-1906 was, plain and simple, an attempt by the Kansas legislature to promote its opposition to abortion and its belief that life begins at fertilization. The Kansas legislature never gave a thought to providing an “adequate substitute statutory remedy” in its haste and desire to promote its opposition to abortion through the elimination of a recognized common-law civil cause of action and to promote its belief that life begins at fertilization by modifying the

wrongful death statutes to define that a “person” is an “unborn child” that is “a living individual organism of the species homo sapiens, in utero, at any stage of gestation from fertilization to birth.” Section 1 of 2013 Kansas Senate Bill No. 142 became K.S.A. 60-1906 and Section 2 of 2013 Kansas Senate Bill No. 142 amended the Kansas Wrongful Death Statute by expanding the definition of “person” in K.S.A. 60-1901 to include not yet viable fetuses. See attached as Exhibit 1 Senate Bill No. 142. As noted in Gard’s Kansas Code of Civil Procedure Annotated, this Bill that expands the definition of “person” to include not yet viable fetuses in the Kansas Wrongful Death Statute and that bars common-law civil causes of action for wrongful birth was enacted “as part of the overall right-to-life political movement” by the Kansas legislature in 2013. 5 Kan. Law & Prac., Code of Civ. Pro. Anno. Sec. 60-1906 (5th ed.).

In addition to passing 2013 Senate Bill No. 142, the 2013 Kansas legislature also enacted 2013 House Bill No. 2253 which prohibits certain abortions related to the gender of the unborn child, revises the general and late-term abortion statutes and declares that life begins at fertilization. See attached as Exhibit 2 House Bill No. 2253 Sections 1 through 15. It is clear that these two abortion bills, SB142 and HB 2253, enacted in 2013 were meant to impose the right-to-life opinions and beliefs of the legislature upon all Kansans without regard to Kansans constitutionally protected rights guaranteed by Section 5 and Section 18 of the Bill of Rights of the Kansas Constitution. There is no indication that the Kansas legislature made any attempt to enact any legislation that would provide an adequate substitute statutory remedy for the rights eliminated by Section 1 of SB42 (K.S.A. 60-1906). See attached as Exhibit 3 Supplemental Note on Senate Bill No. 142 and Exhibit 4 Kansas Summary of Legislation,

2013 Regular Session, Senate Bill 142, September 25, 2013 (Discussing both SB142 and HB2253).

**IV. K.S.A. 59-2124 and 38-2282**

A. K.S.A. 59-214

K.S.A. 59-2124 is a statute within the Probate Code of the Kansas Statutes Annotated and is specific to Article 21, Adoption. More specifically, K.S.A. 59-2124 is part of the Kansas Adoption and Relinquishment Act (K.S.A. 59-2111 through K.S.A. 59-2143) that was enacted in 1990. Adoption did not exist at common-law. The requirements and prohibitions of the KARA are designed to protect children and promote permanency of the parent-child relationship. It is clear that K.S.A. 59-2124, as one of many statutes of KARA, was not enacted in 1990 to provide any conceivable “remedy” to any person, but rather was enacted as part of the statutory requirements and prohibitions governing the statutory created legal status of adoption. Simply stated, relinquishing a child for adoption pursuant to the KARA, is not a “remedy” for the child’s parents—it is not a judicial means or method of enforcing a right or preventing or redressing a wrong for the child’s parents. The constitutional guarantees of Section 5 and Section 18 does not allow the legislature to take away a person’s common-law remedy without providing an adequate substitute statutory remedy for the common-law remedy eliminated—relinquishing a child to an agency for adoption is a choice not a remedy.

B. K.S.A. 38-2282

K.S.A. 38-2282 is one statute within the Revised Kansas Code for Care of Children (K.S.A. 38-2201 through K.S.A. 38-2289). The policy and purpose of the Code is set forth in K.S.A. 38-2201(b)(1)-(10) with the safety and welfare of children being paramount. More specifically, K.S.A. 38-2282 is known as the Newborn Infant Protection Act. This statute is

obviously meant to provide a parent who fears for the safety of her or his child an option to surrender physical custody of that child, if she or he is 45 days old or younger, to identified city or county agencies to protect the child from physical abuse. This statute does not provide any “remedy”, but rather provides an option to a parent with a child who is 45 days old or younger who fears for the child’s well-being to protect the child by surrendering the child to specific designated agencies of the city or county. The option created by K.S.A. 38-2282 to protect one’s child who is 45 days old or younger is, by definition, not a remedy—an option to protect one’s child is not a judicial means of method of enforcing a right or preventing or redressing a wrong.

C. Sanctity and Constitutional Protection of Parent/Child Relationship

The most important reason that the choice of relinquishment of a child for adoption or option of surrendering a child who is 45 days old or younger to protect that child is not an “adequate substitute statutory remedy” is that either choice or option is directly contrary to the constitutional protection of the relationship between parent and child. This constitutional protection and sanctity of this most basic of all relationships has been recognized on numerous occasions by the United States Supreme Court:

We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. See, e.g., Wisconsin v. Yoder, 406 U. S. 205, 406 U. S. 231-233 (1972); Stanley v. Illinois, *supra*; Meyer v. Nebraska, 262 U. S. 390, 262 U. S. 399-401 (1923). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 U. S. 158, 321 U. S. 166 (1944). And it is now firmly established that "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Cleveland Board of Education v. LaFleur, 414 U. S. 632, 414 U. S. 639-640 (1974).

Quilloin v. Walcott, 98 S. Ct. 549,554-555 (1978).

The Kansas Court of Appeals cited the Quilloin opinion with approval soon after it was decided in In re Adoption of Lathrop, 2 Kan. App.2d 90 (1978): “The rights to conceive and raise one’s children are ‘essential rights’ protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment even though the family relationship is unlegitimized by marriage.” Id. at Sly. 1. The Kansas Supreme Court agreed in the case of In the Interest of Cooper by holding that: “The parents’ rights of custody and control of their children are liberty interests protected by the Fourteenth Amendment Due Process Clause.” 230 Kan. 57, Syl. 1 (1981). The Court further described this fundamental right in Sheppard v. Sheppard, 230 Kan. 146 (1981) as a “fundamental right, protected by the Due Process Clause of the United States Constitution, to the care, custody and control of his or her child, and that right of such a parent to custody of the child cannot be taken away in favor of a third person, absent a finding of unfitness on the part of the parent.” Id. at 154. The Sheppard opinion was cited with approval by the Court in the case of In re Adoption of McMullen, 236 Kan. 348 (1984): “We agree that parental rights are fundamental in nature and are constitutionally protected.” Id. at 352.

The fundamental constitutional protection of the parent/child relationship long recognized by the Kansas Appellate Courts cannot be abrogated by the State without compelling interest. The Court of Appeals recently made it very clear that there is no question in Kansas that the Fourteenth Amendment protects the parent/child relationship against intrusion by the State: “Without question, the Fourteenth Amendment protects the parent/child relationship as a fundamental liberty interest that cannot be abrogated by the state without compelling interest. In re Adoption of C.R.D., 21 Kan. App. 2d 94, 98, 897 P.2d 181 (1995)” In re Adoption of Baby Girl T., 28 Kan.App.2d 712, 723 (2001). The opinion cited, In re Adoption of C.R.D., cites with approval the United States Supreme Court opinion in Quilloin

and clearly states: “Basic parental rights are fundamental rights protected by the Fourteenth Amendment to the Constitution of the United States. The right to be a legal parent of a child is one of those rights, which cannot be abrogated except for compelling reasons.” In re Adoption of C.R.D., 21 Kan.App.2d 94, 98 (1995)

Plaintiffs’ Alysia R. Tillman and Storm Fleetwood are the natural biological parents of Baby A, born May 18, 2014. Vol. I, p. 3-9. The parent/child relationship between Plaintiffs’ Alysia R. Tillman and Storm Fleetwood and Baby A is a fundamental liberty interest protected by the Fourteenth Amendment of the United States Constitution. This fundamental liberty interest cannot be abrogated (abolished by formal or authoritative action) by the state. For this Court to determine that either K.S.A.59-2124 or K.S.A.38-2282 provides an “adequate substitute statutory remedy” for the common-law remedy eliminated by K.S.A. 60-1906 would be equivalent of abolishing Plaintiffs’ fundamental parent/child liberty rights guaranteed by the Bill of Rights of the United States Constitution. To even consider that an adequate substitute statutory remedy for the elimination of Plaintiffs’ right to remedy and jury trial rights requires Plaintiffs’ to give up another constitutionally protected right clearly demonstrates why this Court must reject any notion that either of these two statutes meet the Second Step of the *quid pro quo* test. Plaintiffs’ parent/child fundamental liberty rights must not and cannot be sacrificed as a basis for holding that K.S.A. 60-1906 is constitutional. To do otherwise would not only ignore the basic, fundamental parent/child liberty rights protected by the Fourteenth Amendment long recognized by the Kansas Appellate Courts—it would fly in the face of the “family values” of all Kansans!

#### **V. Comprehensive Statutory Scheme**

The statute in question is not part of a “comprehensive statutory scheme” such as the Kansas Health Care Provider Insurance Availability Act (K.S.A. 40-3401, et seq.), the Kansas Workers Compensation Act (K.S.A. 44-501, et seq.), or the Kansas Automobile Injury Reparations Act (K.S.A. 40-3101, et seq.). There was no attempt by the legislature to substitute an adequate statutory remedy for the elimination/prohibition of Plaintiffs’ recognized common-law civil cause of action to recovery money damages within 2013 Kansas Senate Bill No. 142. There was no attempt by the legislature in 2013 or thereafter to enact legislation that would substitute an adequate statutory remedy for the elimination/prohibition of Plaintiffs’ recognized common-law civil cause of action to recovery money damages. There has been no attempt by the legislature prior to or after 2013 to enact any “comprehensive statutory scheme” that would substitute an adequate statutory remedy for the elimination/prohibition of Plaintiffs’ recognized common-law civil cause of action to recovery money damages.

Most of the Kansas Supreme Court opinions that involve the Court’s Step Two analysis and determination of whether the legislature has provided an “adequate substitute statutory remedy” have involved comprehensive statutory schemes that specifically modify or eliminate a common-law remedy and jury trial right and provide a substitute statutory remedy within the same comprehensive statutory schemes. The Court in these opinions, applying the Step Two analysis, has found that there was an “adequate substitute statutory remedy” within the Kansas Workers’ Compensation Act (Injured Workers of Kansas v. Franklin, 262 Kan. 840, 852 & 853 (1997); within the Kansas Automobile Reparations Act/No Fault Act (Manzanares v. Bell, 214 Kan. 589, 599 (1974); and within the Kansas Health Care Provider Insurance Availability Act (Bair v. Peck, 248 Kan. 824, 843-844 (1991) and Aves v. Shah,

258 Kan. 506, 521-524 (1995)) for the modification or elimination of a common-law remedy and right to jury trial.

In each instance, the specific modification or elimination of a common-law remedy and right to jury trial was within the same comprehensive statutory scheme that provided the adequate substitute statutory remedy. In the Bair and Aves opinions the adequate substitute statutory remedy was the mandatory professional liability insurance and excess coverage required of all health care providers as a condition to being allowed to provide health care services in Kansas.

Another Kansas Supreme Court opinion determined that the mandatory insurance required by the Kansas Health Care Provider Insurance Availability Act was an adequate substitute remedy for K.S.A. 65-442(b)'s elimination of a plaintiff's remedy to bring suit against a hospital for corporate negligence because K.S.A. 65-442 and the Health Care Provider Insurance Availability Act were both enacted in 1976 and both were considered to "be part of the legislature's 'package' enacted in response to the medical malpractice crisis of the 1970's" Lemuz v. Fieser, 261 Kan. 936, 950, 959 (1997).

Finally, the Court in Miller v. Johnson determined that the mandatory insurance required by the Health Care Provider Insurance Availability Act was an adequate substitute remedy for the modification of the common-law remedy and right to jury trial by the noneconomic damage cap statute, K.S.A. 60-19a02. The Miller Court justified this determination by first stating, without citing any case, that: "Our caselaw does not require us to look only to contemporaneous *quid pro quo* within the same statutory enactment containing the noneconomic damages cap." Miller, 295 Kan. at 661. The Miller Court followed by holding that: "As a medical malpractice plaintiff, Miller's damages cap operates within the



context of the comprehensive statutory scheme created in the Health Care Provider Insurance Availability Act.” Id.

None of the analysis that exists for the above Kansas Supreme Court opinions finding an adequate substitute statutory remedy exists with regard to K.S.A. 60-1906. There is no comprehensive statutory scheme that K.S.A. 60-1906 can become attached to or related to like the Miller Court did for K.S.A. 60-19a01. Mandatory insurance does not exist for a common-law remedy that has been abolished. There is no conceivable statute or comprehensive statutory scheme that could provide an adequate substitute remedy for the common-law remedy and jury trial right eliminated by K.S.A. 60-1906.

## **VI. Conclusion**

The Kansas legislature has not, before or after 2013, enacted legislation that would meet the requirement of providing an “adequate substitute statutory remedy” for the common-law remedy and jury trial right eliminated by K.S.A. 60-1906. A Section 5 or Section 18 analysis is applicable to determine the constitutionality of K.S.A. 60-1906. Based on either a Section 5 or Section 18 *quid pro quo* analysis, K.S.A. 60-1906 clearly violates Plaintiffs’ jury trial right and Plaintiffs’ right to remedy by due course of law by prohibiting Plaintiffs’ recognized common-law medical negligence wrongful birth cause of action without the legislature providing Plaintiffs with any adequate substitute statutory remedy. Thus, K.S.A. 60-1906 is unconstitutional and void and as a result does not bar Plaintiffs’ common-law medical negligence wrongful birth cause of action. Plaintiffs’ request that this Court declare K.S.A. 60-1906 unconstitutional and void, reverse the District Court’s dismissal of Plaintiffs’ cause of action with prejudice, and remand Plaintiffs’ action back to the District Court for trial on the merits.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was served on this 9<sup>th</sup> day of March, 2018, by e-mail and by electronically filing a copy with the Kansas Judicial Branch e-filing website which sent notices to the following:

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/s/ Lynn R. Johnson

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SENATE BILL No. 142

AN ACT concerning abortion; relating to civil actions related to the performance of abortions; amending K.S.A. 60-1901 and repealing the existing section.

*Be it enacted by the Legislature of the State of Kansas:*

New Section 1. (a) No civil action may be commenced in any court for a claim of wrongful life or wrongful birth, and no damages may be recovered in any civil action for any physical condition of a minor that existed at the time of such minor's birth if the damages sought arise out of a claim that a person's action or omission contributed to such minor's mother not obtaining an abortion.

(b) Nothing in this section shall be deemed to create any new cause of action, nor preclude any otherwise proper cause of action based on a claim that, but for a person's wrongful action or omission, the death or physical injury of the mother would not have occurred, or the handicap, disease or disability of an individual prior to birth would have been prevented, cured or ameliorated in a manner that preserved the health and life of such individual.

(c) If any provision or clause of this act or application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

(d) As used in this section:

(1) "Abortion" has the same meaning as such term is defined in K.S.A. 65-6701, and amendments thereto.

(2) "Claim of wrongful birth" means a cause of action brought by a parent, legal guardian or other individual legally required to provide for the support of a minor, which seeks damages, whether economic or non-economic, as a result of a physical condition of such minor that existed at the time of such minor's birth, and which is based on a claim that a person's action or omission contributed to such minor's mother not obtaining an abortion.

(3) "Claim of wrongful life" means a cause of action brought by, or on behalf of, a minor, which seeks damages, whether economic or non-economic, for such minor as a result of a physical condition of such minor that existed at the time of such minor's birth, and which is based on a claim that a person's action or omission contributed to such minor's mother not obtaining an abortion.

Sec. 2. K.S.A. 60-1901 is hereby amended to read as follows: 60-1901.

(a) If the death of a person is caused by the wrongful act or omission of another, an action may be maintained for the damages resulting therefrom if the former might have maintained the action had he or she such person lived, in accordance with the provisions of this article, against the wrongdoer, or his or her such wrongdoer's personal representative if he or she such wrongdoer is deceased.

(b) As used in article 19 of chapter 60 of the Kansas Statutes Annotated, and amendments thereto, the term "person" includes an unborn child.

(c) As used in this section, the term "unborn child" means a living individual organism of the species homo sapiens, in utero, at any stage of gestation from fertilization to birth.

(d) The provisions of this section shall not apply to a wrongful death action if the death is of an unborn child by means of:

(1) Any act committed by the mother of the unborn child;

(2) any lawful medical procedure performed by a physician or other licensed medical professional at the request of the pregnant woman or her legal guardian;

(3) the lawful dispensation or administration of lawfully prescribed medication; or

(4) a legal abortion.

(e) If any provision or clause of this act or application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Sec. 3. K.S.A. 60-1901 is hereby repealed.

# **EXHIBIT 1**

HOUSE BILL No. 2253

AN ACT concerning abortion; relating to the funding of abortion services; relating to prenatally and postnatally diagnosed conditions; relating to restrictions on late-term abortions; relating to the woman's-right-to-know act; amending K.S.A. 2012 Supp. 40-2246, 65-6701, 65-6703, 65-6709, 65-6710, 76-3308, 79-32,117, 79-32,138, 79-32,182b, 79-32,195, 79-32,261 and 79-3606 and repealing the existing sections.

*Be it enacted by the Legislature of the State of Kansas:*

New Section 1. As used in sections 1 through 8, and amendments thereto:

(a) "Abortion" has the same meaning as such term is defined in K.S.A. 65-6701, and amendments thereto.

(b) "Health benefit plan" means any hospital or medical expense policy, health, hospital or medical services corporation contract, and a plan provided by a municipal group-funded pool, or a health maintenance organization contract offered by any employer or any certificate issued under any such policy, contract or plan.

(c) "Health care entity" means an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization or any other health care facility or organization.

(d) "School district" means any public school district organized under the laws of this state.

(e) "State agency" has the same meaning as such term is defined in K.S.A. 75-3701, and amendments thereto.

New Sec. 2. (a) The legislature hereby finds and declares the following:

(1) The life of each human being begins at fertilization;  
(2) unborn children have interests in life, health and well-being that should be protected; and

(3) the parents of unborn children have protectable interests in the life, health and well-being of the unborn children of such parents.

(b) On and after July 1, 2013, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges and immunities available to other persons, citizens and residents of this state, subject only to the constitution of the United States, and decisional interpretations thereof by the United States supreme court and specific provisions to the contrary in the Kansas constitution and the Kansas Statutes Annotated.

(c) As used in this section:

(1) "Fertilization" means the fusion of a human spermatozoon with a human ovum.

(2) "Unborn children" or "unborn child" shall include all unborn children or the offspring of human beings from the moment of fertilization until birth at every stage of biological development.

(d) Nothing in this section shall be construed as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

New Sec. 3. Except to the extent required by federal law:

(a) No moneys appropriated from the state general fund or from any special revenue fund shall be expended for any abortion;

(b) no tax credit shall be allowed against any income tax, premium or privilege tax liability and no exemption shall be granted from sales or compensating use tax for that portion of such amounts paid or incurred for an abortion, or that portion of such amounts paid or incurred for a health benefit plan, including premium assistance, for the purchase of an optional rider for coverage of abortion in accordance with K.S.A. 2012 Supp. 40-2,190, and amendments thereto;

(c) in the case of any tax-preferred trust or account, the purpose of which is to pay medical expenses of the account beneficiary, any amount paid or distributed from such an account for an abortion shall be included in the gross income of such beneficiary; and

(d) no health care services provided by any state agency, or any employee of a state agency while acting within the scope of such employee's employment, shall include abortion, nor shall money appropriated from the state general fund or from any special revenue fund be used to pay for the lease or operation of any facility in which abortions are performed.

New Sec. 4. No school district, employee or agent thereof, or educational service provider contracting with such school district shall provide abortion services. No school district shall permit any person or entity

# **EXHIBIT 2**

to offer, sponsor or otherwise furnish in any manner any course materials or instruction relating to human sexuality or sexually transmitted diseases if such person or entity is an abortion services provider, or an employee, agent or volunteer of an abortion services provider.

New Sec. 5. Nothing in sections 1 through 8, and amendments thereto, shall repeal, amend or have any effect on any other state law to the extent such law imposes any limitation on the use of funds for abortion, more restrictive than the limitations set forth in sections 1 through 8, and amendments thereto.

New Sec. 6. Nothing in sections 1 through 8, and amendments thereto, shall be construed:

- (a) To require any state agency or municipality to provide or pay for any abortion; or
- (b) as creating or recognizing a right to an abortion.

New Sec. 7. No state agency shall discriminate against any individual or institutional health care entity on the basis that such health care entity does not provide, pay for or refer for abortions.

New Sec. 8. The limitations set forth in sections 1 through 8, and amendments thereto, shall not apply to an abortion which is necessary to preserve the life of the pregnant woman.

New Sec. 9. (a) The secretary of the department of health and environment may authorize and oversee certain activities, including the awarding of grants, contracts or cooperative agreements to eligible entities to:

- (1) Collect, synthesize and disseminate current evidence-based information relating to Down syndrome or other prenatally or postnatally diagnosed conditions; and

- (2) coordinate the provision of, and access to, new or existing supportive services for women and the spouses of such women who receive a positive diagnosis of Down syndrome or other prenatally or postnatally diagnosed conditions for their child, including, but not limited to:

- (A) The establishment of a resource telephone hotline or website accessible to women and the spouses of such women who receive a positive diagnosis of Down syndrome or other prenatally or postnatally diagnosed conditions for their child;

- (B) the development of outreach programs to new and expecting parents to provide them with up-to-date information on the range of outcomes for individuals living with the diagnosed condition, including physical, developmental, educational and psychosocial outcomes;

- (C) the development of local peer support programs to effectively serve women and the spouses of such women who receive a positive diagnosis of Down syndrome or other prenatally or postnatally diagnosed conditions for their child;

- (D) the establishment of a network of local registries of families willing to adopt newborns with Down syndrome or other prenatally or postnatally diagnosed conditions, and links to adoption agencies willing to place babies with Down syndrome or other prenatally or postnatally diagnosed conditions with families willing to adopt; and

- (E) the establishment of awareness and education programs for health care providers who provide, interpret or inform parents of the results of prenatal tests for Down syndrome or other prenatally or postnatally diagnosed conditions to patients.

- (b) A grantee under this section shall make the following available to health care providers of parents who receive a prenatal or postnatal diagnosis for their child:

- (1) Up-to-date, evidence-based, written information concerning the range of outcomes for individuals living with the diagnosed condition, including physical, developmental, educational and psychosocial outcomes;

- (2) contact information regarding support services, including information hotlines and websites specific to Down syndrome or other prenatally or postnatally diagnosed conditions, resource centers or clearinghouses, local peer support groups and other education and support programs.

- (c) Information provided under this subsection shall be culturally and linguistically appropriate as needed by women and the spouses of such women who receive a positive diagnosis for Down syndrome or other

prenatally or postnatally diagnosed conditions for their child, and approved by the secretary.

(d) In distributing funds under this section, the secretary shall place an emphasis on funding partnerships between health care professional groups and disability advocacy organizations.

(e) On or before January 12, 2015, the secretary shall prepare and submit a report to the governor and the legislature on the grants, contracts and cooperative agreements made under this section and the effectiveness of the programs supported by such grants, contracts and cooperative agreements.

(f) As used in this section:

(1) "Down syndrome" means a chromosomal disorder caused by an error in cell division that results in the presence of an extra whole or partial copy of chromosome 21.

(2) "Eligible entity" means the state, or any political subdivision thereof, or any other entity with appropriate expertise in prenatally and postnatally diagnosed conditions, as determined by the secretary.

(3) "Health care provider" shall have the same meaning as that term is defined in K.S.A. 40-3401, and amendments thereto.

(4) "Postnatally diagnosed condition" means any health condition identified during the 12-month period beginning at birth.

(5) "Prenatally diagnosed condition" means any fetal health condition identified by prenatal genetic testing or prenatal screening procedures.

(6) "Prenatal test" means diagnostic or screening tests offered to pregnant women seeking routine prenatal care that are administered on a required or recommended basis by a health care provider based on medical history, family background, ethnic background, previous test results or other risk factors.

(7) "Secretary" means the secretary of the department of health and environment.

New Sec. 10. (a) No person shall perform or induce an abortion or attempt to perform or induce an abortion with knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the unborn child.

(b) (1) A woman upon whom an abortion is performed or induced, or upon whom there is an attempt to perform or induce an abortion, in violation of this section, the father, if married to the woman at the time of the abortion, and the parents or custodial guardian of the woman, if the woman has not attained the age of 18 years at the time of the abortion, may in a civil action obtain appropriate relief, unless, in a case where the plaintiff is not the woman upon whom the abortion was performed, the pregnancy resulted from the plaintiff's criminal conduct.

(2) Such relief shall include:

(A) Money damages for all injuries, psychological and physical, occasioned by the violation of this section;

(B) statutory damages equal to three times the cost of the abortion;

(C) injunctive relief; and

(D) reasonable attorney fees.

(c) A woman upon whom an abortion is performed shall not be prosecuted under this section for a conspiracy to violate this section pursuant to K.S.A. 2012 Supp. 21-5302, and amendments thereto.

(d) Nothing in this section shall be construed to create a right to an abortion. Notwithstanding any provision of this section, a person shall not perform an abortion that is prohibited by law.

(e) Upon a first conviction of a violation of this section, a person shall be guilty of a class A person misdemeanor. Upon a second or subsequent conviction of a violation of this section, a person shall be guilty of a severity level 10, person felony.

(f) If any provision or clause of this act or application thereof to any person or circumstance is held invalid, such invalidity shall not affect the other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

(g) For purposes of this section, the term "abortion" has the same meaning as such term is defined in K.S.A. 65-6701, and amendments thereto.

Sec. 11. K.S.A. 2012 Supp. 40-2246 is hereby amended to read as



follows: 40-2246. (a) A credit against the taxes otherwise due under the Kansas income tax act shall be allowed to an employer for amounts paid during the taxable year for purposes of this act on behalf of an eligible employee as defined in K.S.A. 40-2239, and amendments thereto, to provide health insurance or care and amounts contributed to health savings accounts of eligible covered employees, *except that for taxable years commencing after December 31, 2013, no credit shall be allowed pursuant to this section for that portion of any amounts paid by an employer for healthcare expenditures, a health benefit plan, as defined in section 1, and amendments thereto, or amounts contributed to health savings accounts for the purchase of an optional rider for coverage of abortion in accordance with K.S.A. 40-2,190, and amendments thereto.*

(b) (1) For employers that have established a small employer health benefit plan after December 31, 1999, but prior to January 1, 2005, the amount of the credit allowed by subsection (a) shall be \$35 per month per eligible covered employee or 50% of the total amount paid by the employer during the taxable year, whichever is less, for the first two years of participation. In the third year, the credit shall be equal to 75% of the lesser of \$35 per month per employee or 50% of the total amount paid by the employer during the taxable year. In the fourth year, the credit shall be equal to 50% of the lesser of \$35 per month per employee or 50% of the total amount paid by the employer during the taxable year. In the fifth year, the credit shall be equal to 25% of the lesser of \$35 per month per employee or 50% of the total amount paid by the employer during the taxable year. For the sixth and subsequent years, no credit shall be allowed.

(2) For employers that have established a small employer health benefit plan or made contributions to a health savings account of an eligible covered employee after December 31, 2004, the amount of credit allowed by subsection (a) shall be \$70 per month per eligible covered employee for the first 12 months of participation, \$50 per month per eligible covered employee for the next 12 months of participation and \$35 per eligible covered employee for the next 12 months of participation. After 36 months of participation, no credit shall be allowed.

(c) If the credit allowed by this section is claimed, the amount of any deduction allowable under the Kansas income tax act for expenses described in this section shall be reduced by the dollar amount of the credit. The election to claim the credit shall be made at the time of filing the tax return in accordance with law. If the credit allowed by this section exceeds the taxes imposed under the Kansas income tax act for the taxable year, that portion of the credit which exceeds those taxes shall be refunded to the taxpayer.

(d) Any amount of expenses paid by an employer under this act shall not be included as income to the employee for purposes of the Kansas income tax act. If such expenses have been included in federal taxable income of the employee, the amount included shall be subtracted in arriving at state taxable income under the Kansas income tax act.

(e) The secretary of revenue shall promulgate rules and regulations to carry out the provisions of this section.

(f) This section shall apply to all taxable years commencing after December 31, 1999.

(g) For tax year 2013 and all tax years thereafter, the income tax credit provided by this section shall only be available to taxpayers subject to the income tax on corporations imposed pursuant to subsection (c) of K.S.A. 79-32,110, and amendments thereto, and shall be applied only against such taxpayer's corporate income tax liability.

Sec. 12. K.S.A. 2012 Supp. 65-6701 is hereby amended to read as follows: 65-6701. As used in ~~this act~~ *K.S.A. 65-6701 through 65-6721, and amendments thereto:*

(a) "Abortion" means 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.

(b) "Bodily function" means physical functions only. The term "bodily function" does not include mental or emotional functions.

(c) "Counselor" means a person who is: (1) Licensed to practice medicine and surgery; ~~(2) licensed to practice psychology; (3) licensed to practice professional or practical nursing; (4) registered to practice professional counseling; (5) licensed as a social worker; (6) the holder of a master's or doctor's degree from an accredited graduate school of social work; (7) registered to practice marriage and family therapy; (8) licensed to practice professional or practical nursing; (3) the following persons licensed to practice behavioral sciences: Licensed psychologists, licensed master's level psychologists, licensed clinical psychotherapists, licensed social workers, licensed specialist clinical social workers, licensed marriage and family therapists, licensed clinical marriage and family therapists, licensed professional counselors, licensed clinical professional counselors;~~ (4) a licensed physician assistant; or ~~(4)~~ (5) a currently ordained member of the clergy or religious authority of any religious denomination or society. Counselor does not include the physician who performs or induces the abortion or a physician or other person who assists in performing or inducing the abortion.

~~(c)~~(d) "Department" means the department of health and environment.

(e) "Fertilization" means the fusion of a human spermatozoon with a human ovum.

~~(d)~~(f) "Gestational age" means the time that has elapsed since the first day of the woman's last menstrual period.

~~(e)~~(g) "Medical emergency" means ~~that a condition which, on the basis of the physician's good faith clinical judgment, that, in reasonable medical judgment,~~ so complicates the medical condition of a the pregnant woman as to necessitate the immediate abortion of her pregnancy ~~without first determining gestational age to avert her the death of the woman or for which a delay necessary to determine gestational age will create serious risk of substantial and irreversible physical impairment of a major bodily function. No condition shall be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function.~~

~~(f)~~(h) "Minor" means a person less than 18 years of age.

~~(g)~~(i) "Physician" means a person licensed to practice medicine and surgery in this state.

~~(h)~~(j) "Pregnant" or "pregnancy" means that female reproductive condition of having an unborn child in the mother's body.

~~(i)~~(k) "Qualified person" means an agent of the physician who is a psychologist, licensed social worker, ~~registered licensed professional counselor, licensed marriage and family therapist, licensed master's level psychologist, licensed clinical psychotherapist,~~ registered nurse or physician.

~~(j)~~(l) "Unemancipated minor" means any minor who has never been: (1) Married; or (2) freed, by court order or otherwise, from the care, custody and control of the minor's parents.

~~(k)~~(m) "Viable" means that stage of fetal development when it is the physician's judgment according to accepted obstetrical or neonatal standards of care and practice applied by physicians in the same or similar circumstances that there is a reasonable probability that the life of the child can be continued indefinitely outside the mother's womb with natural or artificial life-supportive measures.

Sec. 13. K.S.A. 2012 Supp. 65-6703 is hereby amended to read as follows: 65-6703. (a) No person shall perform or induce, or attempt to perform or induce an abortion when the unborn child is viable unless such person is a physician and has a documented referral from another physician not legally or financially affiliated with the physician performing or inducing, or attempting to perform or induce the abortion and both physicians provide a written determination, based upon a medical judgment arrived at using and exercising that degree of care, skill and proficiency commonly exercised by the ordinary skillful, careful and prudent physician in the same or similar circumstances and that would be made by a reasonably prudent physician, knowledgeable in the field, and knowledgeable about the case and the treatment possibilities with respect to

the conditions involved, that: (1) The abortion is necessary to preserve the life of the pregnant woman; or (2) a continuation of the pregnancy will cause a substantial and irreversible *physical* impairment of a major bodily function of the pregnant woman. *No condition shall be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct that would result in her death or in substantial and irreversible physical impairment of a major bodily function.*

(b) Except in the case of a medical emergency, a copy of the written documented referral and of the abortion-performing physician's written determination shall be provided to the pregnant woman no less than 30 minutes prior to the initiation of the abortion. The written determination shall be time-stamped at the time it is delivered to the pregnant woman. The medical basis for the determination shall also be reported by the physician as part of the written report made by the physician to the secretary of health and environment under K.S.A. 65-445, and amendments thereto. Such determination shall specify:

(1) If the unborn child was determined to be nonviable and the medical basis of such determination;

(2) if the abortion is necessary to preserve the life of the pregnant woman and the medical basis of such determination, including the specific medical condition the physician believes would cause the death of the pregnant woman; or

(3) if a continuation of the pregnancy will cause a substantial and irreversible *physical* impairment of a major bodily function of the pregnant woman and the medical basis of such determination, including the specific medical condition the physician believes would constitute a substantial and irreversible *physical* impairment of a major bodily function of the pregnant woman.

(c)(1) Except in the case of a medical emergency, prior to performing or inducing, or attempting to perform or induce an abortion upon a woman, the physician shall determine the gestational age of the unborn child according to accepted obstetrical and neonatal practice and standards applied by physicians in the same or similar circumstances. If the physician determines the gestational age is less than 22 weeks, the physician shall document as part of the medical records of the woman the basis for the determination. The medical basis for the determination of the gestational age of the unborn child shall also be reported by the physician as part of the written report made by the physician to the secretary of health and environment under K.S.A. 65-445, and amendments thereto.

(2) If the physician determines the gestational age of the unborn child is 22 or more weeks, prior to performing or inducing, or attempting to perform or induce an abortion upon the woman the physician shall determine if the unborn child is viable by using and exercising that degree of care, skill and proficiency commonly exercised by the ordinary skillful, careful and prudent physician in the same or similar circumstances. In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age of the unborn child and shall enter such findings and determinations of viability in the medical record of the woman.

(3) If the physician determines the gestational age of an unborn child is 22 or more weeks, and determines that the unborn child is not viable and performs an abortion on the woman, the physician shall report such determinations, the medical basis and the reasons for such determinations in writing to the medical care facility in which the abortion is performed for inclusion in the report of the medical care facility to the secretary of health and environment under K.S.A. 65-445, and amendments thereto, or if the abortion is not performed in a medical care facility, the physician shall report such determinations, the medical basis and the reasons for such determinations in writing to the secretary of health and environment as part of the written report made by the physician to the secretary of health and environment under K.S.A. 65-445, and amendments thereto.

(4) If the physician who is to perform the abortion determines the gestational age of an unborn child is 22 or more weeks, and determines that the unborn child is viable, both physicians under subsection (a) determine in accordance with the provisions of subsection (a) that an abortion is necessary to preserve the life of the pregnant woman or that a

continuation of the pregnancy will cause a substantial and irreversible *physical* impairment of a major bodily function of the pregnant woman and the physician performs an abortion on the woman, the physician who performs the abortion shall report such determinations, the medical basis and the reasons for such determinations, including the specific medical diagnosis for the determination that an abortion is necessary to preserve the life of the pregnant woman or that a continuation of the pregnancy will cause a substantial and irreversible *physical* impairment of a major bodily function of the pregnant woman and the name of the referring physician required by subsection (a) in writing to the medical care facility in which the abortion is performed for inclusion in the report of the medical care facility to the secretary of health and environment under K.S.A. 65-445, and amendments thereto, or if the abortion is not performed in a medical care facility, the physician who performs the abortion shall report such determinations, the medical basis and the reasons for such determinations, including the specific medical diagnosis for the determination that an abortion is necessary to preserve the life of the pregnant woman or that a continuation of the pregnancy will cause a substantial and irreversible *physical* impairment of a major bodily function of the pregnant woman and the name of the referring physician required by subsection (a) in writing to the secretary of health and environment as part of the written report made by the physician to the secretary of health and environment under K.S.A. 65-445, and amendments thereto.

(5) The physician shall retain the medical records required to be kept under paragraphs (1) and (2) of this subsection (c) for not less than 10 years and shall retain a copy of the written reports required under paragraphs (3) and (4) of this subsection (c) for not less than 10 years.

(d) The secretary of health and environment shall adopt rules and regulations to administer this section. Such rules and regulations shall include:

(1) A detailed list of the information that must be kept by a physician under paragraphs (1) and (2) of subsection (c);

(2) the contents of the written reports required under paragraphs (3) and (4) of subsection (c); and

(3) detailed specifications regarding information that must be provided by a physician in order to comply with the obligation to disclose the medical basis and specific medical diagnosis relied upon in determining that an abortion is necessary to preserve the life of the pregnant woman or that a continuation of the pregnancy will cause a substantial and irreversible *physical* impairment of a major bodily function of the pregnant woman.

(c) A woman upon whom an abortion is performed shall not be prosecuted under this section for a conspiracy to violate this section pursuant to K.S.A. 2012 Supp. 21-5302, and amendments thereto.

(f) Nothing in this section shall be construed to create a right to an abortion. Notwithstanding any provision of this section, a person shall not perform an abortion that is prohibited by law.

(g) (1) A woman upon whom an abortion is performed in violation of this section, the father, if married to the woman at the time of the abortion, and the parents or custodial guardian of the woman, if the woman has not attained the age of 18 years at the time of the abortion, may in a civil action obtain appropriate relief, unless, in a case where the plaintiff is not the woman upon whom the abortion was performed, the pregnancy resulted from the plaintiff's criminal conduct.

(2) Such relief shall include:

(A) Money damages for all injuries, psychological and physical, occasioned by the violation of this section;

(B) statutory damages equal to three times the cost of the abortion; and

(C) reasonable attorney fees.

(h) The prosecution of violations of this section may be brought by the attorney general or by the district attorney or county attorney for the county where any violation of this section is alleged to have occurred.

(i) Nothing in this section shall be construed to restrict the authority of the board of healing arts to engage in a disciplinary action.

(j) If any provision of this section is held to be invalid or unconstitutional, it shall be conclusively presumed that the legislature would have

enacted the remainder of this section without such invalid or unconstitutional provision.

(k) Upon a first conviction of a violation of this section, a person shall be guilty of a class A nonperson misdemeanor. Upon a second or subsequent conviction of a violation of this section, a person shall be guilty of a severity level 10, nonperson felony.

Sec. 14. K.S.A. 2012 Supp. 65-6709 is hereby amended to read as follows: 65-6709. No abortion shall be performed or induced without the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced. Except in the case of a medical emergency, consent to an abortion is voluntary and informed only if:

(a) At least 24 hours before the abortion the physician who is to perform the abortion or the referring physician has informed the woman in writing of:

- (1) The name of the physician who will perform the abortion;
- (2) a description of the proposed abortion method;
- (3) a description of risks related to the proposed abortion method, including *risk of premature birth in future pregnancies, risk of breast cancer and risks to the woman's reproductive health and alternatives to the abortion that a reasonable patient would consider material to the decision of whether or not to undergo the abortion;*
- (4) the probable gestational age of the unborn child at the time the abortion is to be performed and that Kansas law requires the following: "No person shall perform or induce an abortion when the unborn child is viable unless such person is a physician and has a documented referral from another physician not financially associated with the physician performing or inducing the abortion and both physicians determine that: (1) The abortion is necessary to preserve the life of the pregnant woman; or (2) a continuation of the pregnancy will cause a substantial and irreversible *physical* impairment of a major bodily function of the pregnant woman." If the child is born alive, the attending physician has the legal obligation to take all reasonable steps necessary to maintain the life and health of the child;
- (5) the probable anatomical and physiological characteristics of the unborn child at the time the abortion is to be performed;
- (6) the contact information for ~~free~~ counseling assistance for medically challenging pregnancies ~~and, the contact information for free perinatal hospice services and a listing of websites for national perinatal assistance, including information regarding which entities provide such services free of charge;~~
- (7) the medical risks associated with carrying an unborn child to term; and
- (8) any need for anti-Rh immune globulin therapy, if she is Rh negative, the likely consequences of refusing such therapy and the cost of the therapy.

(b) At least 24 hours before the abortion, the physician who is to perform the abortion, the referring physician or a qualified person has informed the woman in writing that:

- (1) Medical assistance benefits may be available for prenatal care, childbirth and neonatal care, and that more detailed information on the availability of such assistance is contained in the printed materials given to her and described in K.S.A. 65-6710, and amendments thereto;
- (2) the informational materials in K.S.A. 65-6710, and amendments thereto, are available in printed form and online, and describe the unborn child, list agencies which offer alternatives to abortion with a special section listing adoption services and list providers of free ultrasound services;
- (3) the father of the unborn child is liable to assist in the support of her child, even in instances where he has offered to pay for the abortion except that in the case of rape this information may be omitted;
- (4) the woman is free to withhold or withdraw her consent to the abortion at any time prior to invasion of the uterus without affecting her right to future care or treatment and without the loss of any state or federally-funded benefits to which she might otherwise be entitled; ~~and~~
- (5) the abortion will terminate the life of a whole, separate, unique, living human being; *and*
- (6) *by no later than 20 weeks from fertilization, the unborn child has the physical structures necessary to experience pain. There is evidence*

*that by 20 weeks from fertilization unborn children seek to evade certain stimuli in a manner that in an infant or an adult would be interpreted to be a response to pain. Anesthesia is routinely administered to unborn children who are 20 weeks from fertilization or older who undergo pre-natal surgery.*

(c) At least 30 minutes prior to the abortion procedure, prior to physical preparation for the abortion and prior to the administration of medication for the abortion, the woman shall meet privately with the physician who is to perform the abortion and such person's staff to ensure that she has an adequate opportunity to ask questions of and obtain information from the physician concerning the abortion.

(d) At least 24 hours before the abortion, the woman is given a copy of the informational materials described in K.S.A. 65-6710, and amendments thereto. If the woman asks questions concerning any of the information or materials, answers shall be provided to her in her own language.

(e) The woman certifies in writing on a form provided by the department, prior to the abortion, that the information required to be provided under subsections (a), (b) and (d) has been provided and that she has met with the physician who is to perform the abortion on an individual basis as provided under subsection (c). All physicians who perform abortions shall report the total number of certifications received monthly to the department. *The total number of certifications shall be reported by the physician as part of the written report made by the physician to the secretary of health and environment under K.S.A. 65-445, and amendments thereto.* The department shall make the number of certifications received available on an annual basis.

(f) Prior to the performance of the abortion, the physician who is to perform the abortion or the physician's agent receives a copy of the written certification prescribed by subsection (e) of this section.

(g) The woman is not required to pay any amount for the abortion procedure until the 24-hour waiting period has expired.

(h) A physician who will use ultrasound equipment preparatory to or in the performance of the abortion, at least 30 minutes prior to the performance of the abortion:

(1) Informs the woman that she has the right to view the ultrasound image of her unborn child, at no additional expense to her;

(2) informs the woman that she has the right to receive a physical picture of the ultrasound image, at no additional expense to her;

(3) offers the woman the opportunity to view the ultrasound image and receive a physical picture of the ultrasound image;

(4) certifies in writing that the woman was offered the opportunity to view the ultrasound image and receive a physical picture of the ultrasound image at least 30 minutes prior to the performance of the abortion; and

(5) obtains the woman's signed acceptance or rejection of the opportunity to view the ultrasound image and receive a physical picture of the ultrasound image.

If the woman accepts the offer and requests to view the ultrasound image, receive a physical picture of the ultrasound image or both, her request shall be granted by the physician at no additional expense to the woman. The physician's certification shall be time-stamped at the time the opportunity to view the ultrasound image and receive a physical picture of the ultrasound image was offered.

(i) A physician who will use heart monitor equipment preparatory to or in the performance of the abortion, at least 30 minutes prior to the performance of the abortion:

(1) Informs the woman that she has the right to listen to the heartbeat of her unborn child, at no additional expense to her;

(2) offers the woman the opportunity to listen to the heartbeat of her unborn child;

(3) certifies in writing that the woman was offered the opportunity to listen to the heartbeat of her unborn child at least 30 minutes prior to the performance of the abortion; and

(4) obtains the woman's signed acceptance or rejection of the opportunity to listen to the heartbeat of her unborn child.

If the woman accepts the offer and requests to listen to the heartbeat of her unborn child, her request shall be granted by the physician at no additional expense to the woman. The physician's certification shall be

time-stamped at the time the opportunity to listen to the heartbeat of her unborn child was offered.

(j) The physician's certification required by subsections (h) and (i) together with the pregnant woman's signed acceptance or rejection of such offer shall be placed in the woman's medical file in the physician's office and kept for 10 years. However, in the case of a minor, the physician shall keep a copy of the certification and the signed acceptance or rejection in the minor's medical file for five years past the minor's majority, but in no event less than 10 years.

(k) Any private office, freestanding surgical outpatient clinic or other facility or clinic in which abortions are performed shall conspicuously post a sign in a location so as to be clearly visible to patients. The sign required pursuant to this subsection shall be printed with lettering that is legible and shall be at least three quarters of an inch boldfaced type which reads: *The sign shall include the address for the pregnancy resources website published and maintained by the department of health and environment, and the following text:*

*Notice: It is against the law for anyone, regardless of their relationship to you, to force you to have an abortion. By law, we cannot perform an abortion on you unless we have your freely given and voluntary consent. It is against the law to perform an abortion on you against your will. You have the right to contact any local or state law enforcement agency to receive protection from any actual or threatened physical abuse or violence. You have the right to change your mind at any time prior to the actual abortion and request that the abortion procedure cease. It is unlawful for anyone to make you have an abortion against your will, even if you are a minor. The father of your child must provide support for the child, even if he has offered to pay for an abortion. If you decide not to have an abortion, you may qualify for financial help for pregnancy, childbirth and newborn care. If you qualify, medicaid will pay or help pay the cost of doctor, clinic, hospital and other related medical expenses, including childbirth delivery services and care for your newborn baby. Many agencies are willing to provide assistance so that you may carry your child to term, and to assist you after your child's birth.*

The provisions of this subsection shall not apply to any private office, freestanding surgical outpatient clinic or other facility or clinic which performs abortions only when necessary to prevent the death of the pregnant woman.

*(l) Any private office, freestanding surgical outpatient clinic or other facility or clinic in which abortions are performed that has a website shall publish an easily identifiable link on the homepage of such website that directly links to the department of health and environment's website that provides informed consent materials under the woman's-right-to-know act. Such link shall read: "The Kansas Department of Health and Environment maintains a website containing objective, nonjudgmental, scientifically accurate information about the development of the unborn child, as well as video of sonogram images of the unborn child at various stages of development. The Kansas Department of Health and Environment's website can be reached by clicking here."*

~~(m)~~ For purposes of this section:

(1) The term "human being" means an individual living member of the species of homo sapiens, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation.

(2) The term "medically challenging pregnancy" means a pregnancy where the unborn child is diagnosed as having: (A) A severe anomaly; or (B) an illness, disease or defect which is invariably fatal.

Sec. 15. K.S.A. 2012 Supp. 65-6710 is hereby amended to read as follows: 65-6710. (a) The department shall cause to be published and distributed widely, within 30 days after the effective date of this act, and shall update on an annual basis, the following easily comprehensible informational materials:

(1) Geographically indexed printed materials designed to inform the woman of public and private agencies and services available to assist a woman through pregnancy, upon childbirth and while her child is dependent, including but not limited to, a list of providers of free ultrasound services and adoption agencies. The materials shall include a comprehensive list of the agencies, a description of the services they offer and the

telephone numbers and addresses of the agencies; and inform the woman about available medical assistance benefits for prenatal care, childbirth and neonatal care and about the support obligations of the father of a child who is born alive. The department shall ensure that the materials described in this section are comprehensive and do not directly or indirectly promote, exclude or discourage the use of any agency or service described in this section. The materials shall also contain a toll-free 24-hour-a-day telephone number which may be called to obtain, orally, such a list and description of agencies in the locality of the caller and of the services they offer. The materials shall state that it is unlawful for any individual to coerce a woman to undergo an abortion, and that any physician who performs an abortion upon a woman without her informed consent may be liable to her for damages. Kansas law permits adoptive parents to pay costs of prenatal care, childbirth and neonatal care. The materials shall include the following statement:

"Many public and private agencies exist to provide counseling and information on available services. You are strongly urged to seek their assistance to obtain guidance during your pregnancy. In addition, you are encouraged to seek information on ~~abortion services~~; alternatives to abortion, including adoption, and resources available to postpartum mothers. The law requires that your physician or the physician's agent provide the enclosed information."

(2) Printed materials that inform the pregnant woman of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term, including pictures or drawings representing the development of an unborn child at two-week gestational increments, and any relevant information on the possibility of the unborn child's survival. Any such pictures or drawings shall contain the dimensions of the unborn child and shall be realistic. The material shall include the ~~statement following statements~~: (A) *That by no later than 20 weeks from fertilization, the unborn child has the physical structures necessary to experience pain;* (B) *that there is evidence that by 20 weeks from fertilization unborn children seek to evade certain stimuli in a manner that in an infant or an adult would be interpreted to be a response to pain;* (C) *that anesthesia is routinely administered to unborn children who are 20 weeks from fertilization or older who undergo prenatal surgery;* (D) *that less than 5% of all natural pregnancies end in spontaneous miscarriage after detection of cardiac activity, and a fetal heartbeat is, therefore, a key medical indicator that an unborn child is likely to achieve the capacity for live birth;* and (E) *that abortion terminates the life of a whole, separate, unique, living human being.* The materials shall be objective, nonjudgmental and designed to convey only accurate scientific information about the unborn child at the various gestational ages. The material shall also contain objective information describing the methods of abortion procedures commonly employed, the medical risks commonly associated with each such procedure, *including risk of premature birth in future pregnancies, risk of breast cancer, risks to the woman's reproductive health* and the medical risks associated with carrying an unborn child to term.

(3) *The printed materials shall, at a minimum, contain the following text:*

*Your doctor is required to tell you about the nature of the physical and emotional risks of both the abortion procedure and carrying a child to term. The doctor must tell you how long you have been pregnant and must give you a chance to ask questions and discuss your decision about the pregnancy carefully and privately in your own language.*

*In order to determine the gestational age of the unborn child, the doctor may use ultrasound equipment preparatory to the performance of an abortion. You have the right to view the ultrasound image of the unborn child at no additional expense, and you have the right to receive a picture of the unborn child.*

*A directory of services is also available. By calling or visiting the agencies and offices in the directory you can find out about alternatives to abortion, assistance to make an adoption plan for your baby or locate public and private agencies that offer medical and financial help during pregnancy, during childbirth and while you are raising your child.*

*Furthermore, you should know that: (A) It is unlawful for any individual to coerce you to undergo an abortion. Coercion is the use of express*



or implied threats of violence or intimidation to compel a person to act against such person's will; (B) abortion terminates the life of a whole, separate, unique, living human being; (C) any physician who fails to provide informed consent prior to performing an abortion may be guilty of unprofessional conduct and liable for damages; (D) you are not required to pay any amount for the abortion procedure until the 24-hour waiting period has expired; (E) the father of your child is legally responsible to assist in the support of the child, even in instances where the father has offered to pay for an abortion; and (F) the law permits adoptive parents to pay the costs of prenatal care, childbirth and neonatal care.

Many public and private agencies exist to provide counseling and information on available services. You are strongly urged to seek assistance from such agencies in order to obtain guidance during your pregnancy. In addition, you are encouraged to seek information on alternatives to abortion, including adoption, and resources available to postpartum mothers. The law requires that your physician, or the physician's agent, provide this information.

Pregnancy begins at fertilization with the union of a man's sperm and a woman's egg to form a single-cell embryo. This brand new being contains the original copy of a new individual's complete genetic code. Gender, eye color and other traits are determined at fertilization.

Most significant developmental milestones occur long before birth during the first eight weeks following fertilization when most body parts and all body systems appear and begin to function. The main divisions of the body, such as the head, chest, abdomen, pelvis, arms and legs are established by about four weeks after fertilization. Eight weeks after fertilization, except for the small size, the developing human's overall appearance and many internal structures closely resemble the newborn.

Pregnancy is not just a time for growing all the parts of the body. It is also a time of preparation for survival after birth. Starting more than 30 weeks before birth, many common daily activities seen in children and adults begin in the womb. These activities include, but are not limited to, hiccups, touching the face, breathing motions, urination, right- or left-handedness, thumb-sucking, swallowing, yawning, jaw movement, reflexes, REM sleep, hearing, taste and sensation.

Unless otherwise noted, all prenatal ages in the rest of these materials are referenced from the start of the last normal menstrual period. This age is two weeks greater than the age since fertilization.

By five weeks, development of the brain, the spinal cord and the heart is well underway. The heart begins beating at five weeks and one day, and is visible by ultrasound almost immediately. By six weeks, the heart is pumping the unborn child's own blood to such unborn child's brain and body. All four chambers of the heart are present, and more than one million heartbeats have occurred. The head, chest and abdominal cavities have formed and the beginnings of the arms and legs are easily seen. At 6½ weeks, rapid brain development continues with the appearance of the cerebral hemispheres. At 7½ weeks, the unborn child reflexively turns away in response to light touch on the face. The fingers also begin to form on the hand.

By 8½ weeks, the bones of the jaw and collarbone begin to harden. Brainwaves have been measured and recorded by this point in gestation. By nine weeks, the hands move, the neck turns and hiccups begin. Girls also now have ovaries and boys have testes. The unborn child's heart is nearly fully formed, and the heart rate peaks at about 170 beats per minute and will gradually slow down until birth. Electrical recordings of the heart at 9½ weeks are very similar to the EKG tracing of the unborn child.

By 10 weeks, intermittent breathing motions begin, and the kidneys begin to produce and release urine. All the fingers and toes are free and fully formed, and several hundred muscles are now present. The hands and feet move frequently, and most unborn children show the first signs of right- or left-handedness. Pain receptors in the skin, the sensory nerves connecting them to the spinal cord, and the nerve tracts in the spinal cord that will carry pain impulses to the brain are all present by this time. Experts estimate the 10-week unborn child possesses approximately 90% of the 4,500 body parts found in adults. This means approximately 4,000 permanent body parts are present just eight weeks after fertilization.

By 11 weeks, the head moves forward and back, the jaw actively opens

and closes and the unborn child periodically sighs and stretches. The face, palms of the hands and soles of the feet are sensitive to light touch. The unborn child begins thumb-sucking and swallowing amniotic fluid. The uterus is now present, and girls' ovaries now contain reproductive cells that will give rise to eggs later in life.

At 12 weeks, fingerprints start forming, while fingernails and toenails begin to grow. The bones are hardening in many locations. The heartbeat can be detected with a hand-held doppler fetal monitor, or external heart rate monitor. By 13 weeks the lips and nose are fully formed and the unborn child can make complex facial expressions.

At 14 weeks, taste buds are present all over the mouth and tongue. The unborn child now produces a wide variety of hormones. Also, the arms reach final proportion to body size. By 15 weeks, the entire unborn child, except for parts of the scalp, responds to light touch, and tooth development is underway.

At 16 weeks, a pregnant woman may begin to feel the unborn child move. The unborn child also begins making several digestive enzymes. Around 17 weeks, blood cell formation moves to its permanent location inside the bone marrow, and the unborn child begins storing energy in the form of body fat.

By 18 weeks, the formation of the breathing passages, called the bronchial tree, is complete. The unborn child will release stress hormones in response to being poked with a needle. By 19 weeks, the unborn child's heart has beaten more than 20 million times.

By 20 weeks, nearly all organs and structures of the unborn child have been formed. The larynx, or voice box, moves in a way similar to movement seen during crying after birth. The skin has developed sweat glands and is covered by a greasy white substance called vernix, which protects the skin from the long exposure to amniotic fluid. At 21 weeks, breathing patterns, body movements and the heart rate begin to follow daily cycles called circadian rhythms.

By 22 weeks, the cochlea, the organ of hearing, reaches adult size, and the unborn child begins hearing and responding to various sounds. All the skin layers and structures are now complete. The unborn child reacts to stimuli that would be recognized as painful if applied to an adult human. By 22 weeks, some infants can live outside the womb with specialized medical care, and survival rates have been reported as high as 40% in some medical centers. Between 20 and 23 weeks, rapid eye movements begin, which are similar to the REM sleep pattern seen when children and adults have dreams.

By 24 weeks, more than 30 million heartbeats have occurred. Survival rates for infants born at 24 weeks have been reported as high as 81%. By 25 weeks, breathing motions may occur up to 44 times per minute.

By 26 weeks, sudden, loud noises trigger a blink-startle response in the unborn child and may increase body movement, the heart rate and swallowing. The lungs begin to produce a substance necessary for breathing after birth. The survival rate of infants born at 26 weeks has been reported as high as 95%.

By 28 weeks, the sense of smell is functioning and the eyes produce tears. Nearly all infants born between this point and full term survive. By 29 weeks, pupils of the eyes react to light. By 31 weeks, the heart has beat more than 40 million times, and wrinkles in the skin disappear as more fat deposits are formed.

By 32 weeks, breathing movements occur up to 40% of the time. By 34 weeks true alveoli, or air "pocket" cells, begin developing in the lungs. At 36 weeks, scalp hair is silky and lies against the head. By 37 weeks, the unborn child has a firm hand grip, and the heart has beat more than 50 million times. The unborn child initiates labor, ideally around 40 weeks, leading to childbirth.

By state law, no person shall perform or induce an abortion when the unborn child is viable or pain-capable unless such person is a physician and has a documented referral. The physician who performs or induces an abortion when the unborn child is viable must have a documented referral from another physician not legally or financially affiliated with the physician performing or inducing the abortion. Both physicians must determine that the abortion is necessary to preserve the life of the pregnant woman or that a continuation of the pregnancy will cause a substantial and irreversible impairment of a major physical bodily function

*of the pregnant woman. If the child is born alive, the attending physician has the legal obligation to take all reasonable steps necessary to maintain the life and health of the child.*

*What about adoption? Women or couples facing an untimely pregnancy who choose not to take on the full responsibilities of parenthood have another option, which is adoption. Counseling and support services are a key part of adoption and are available from a variety of adoption agencies and parent support groups across the state. A list of adoption agencies is available. There are several ways to make a plan for adoption, including through a child placement agency or through a private attorney. Although fully anonymous adoptions are available, some degree of openness in adoption is more common, such as permitting the birth mother to choose the adoptive parents. A father only has the right to consent to an adoption or refuse consent and raise the child if he provides support for the mother during the last six months of the pregnancy.*

*The father of a child has a legal responsibility to provide for the support, educational, medical and other needs of the child. In Kansas, that responsibility includes child support payments to the child's mother or legal guardian. A child has rights of inheritance from the father and may be eligible through him for benefits such as life insurance, social security, pension, veteran's or disability benefits. Further, the child benefits from knowing the father's medical history and any potential health problems that can be passed genetically. A father's and mother's rights are equal regarding access, care and custody.*

*Paternity can be established in Kansas by two methods: (A) The father and mother, at the time of birth, can sign forms provided by the hospital acknowledging paternity and the father's name is added to the birth certificate; or (B) a legal action can be brought in a court of law to determine paternity and establish a child support order. Issues of paternity affect your legal rights and the rights of the child.*

*The decision regarding your pregnancy is one of the most important decisions you will ever make. There are lists of state, county and local health and social service agencies and organizations available to assist you. You are encouraged to contact these groups if you need more information so you can make an informed decision.*

*(4) A certification form to be used by physicians or their agents under subsection (e) of K.S.A. 65-6709, and amendments thereto, which will list all the items of information which are to be given to women by physicians or their agents under the woman's-right-to-know act.*

*~~(4)~~(5) A standardized video containing all of the information described in paragraphs (1) and (2). In addition, the video shall show ultrasound images, using the best available ultrasound technology, of an unborn child at two week gestational increments.*

*(b) The print materials required under this section shall be printed in a typeface large enough to be clearly legible. The informational video shall *may* be published in digital video disc format or in the latest video technology available. All materials required to be published under this section shall also be published online on the department's website. All materials shall be made available in both English and Spanish language versions.*

*(c) The materials required under this section shall be available at no cost from the department upon request and in appropriate number to any person, facility or hospital.*

*Sec. 16. K.S.A. 2012 Supp. 76-3308 is hereby amended to read as follows: 76-3308. (a) The authority shall have all the powers necessary to carry out the purposes and provisions of this act, including, without limitation, the following powers to:*

- (1) Have the duties, privileges, immunities, rights, liabilities and disabilities of a body corporate and a political instrumentality of the state;*
- (2) have perpetual existence and succession;*
- (3) adopt, have and use a seal and to alter the same at its pleasure;*
- (4) sue and be sued in its own name;*
- (5) make and execute contracts, guarantees or any other instruments and agreements necessary or convenient for the exercise of its powers and functions including, without limitation, to make and execute contracts with hospitals or other health care businesses to operate and manage any*

# **EXHIBIT 3**

SESSION OF 2013

**SUPPLEMENTAL NOTE ON SENATE BILL NO. 142**

As Recommended by Senate Committee on  
Judiciary

**Brief\***

SB 142 would create a new section of law prohibiting civil actions for a claim of wrongful life or wrongful birth. The bill would also prohibit recovery of damages in any civil action for any physical condition of a minor that existed at birth if such damages arise out of a claim that a person's action or omission contributed to the minor's mother not obtaining an abortion.

The bill would define "claim of wrongful birth" as a cause of action brought by a parent, guardian, or individual required to provide for the support of a minor seeking damages due to a physical condition of the minor that existed at the time of birth, and which claims a person's action or omission contributed to the minor's mother not obtaining an abortion.

The bill would define "claim of wrongful life" as a cause of action brought by or for a minor seeking damages for the minor due to a physical condition existing at birth, and which claims a person's action or omission contributed to the minor's mother not obtaining an abortion.

The bill would clarify that nothing in the new section should be deemed to create a new cause of action or preclude any otherwise proper cause of action based on a claim that, but for a person's wrongful action or omission, the death or physical injury of the mother would not have occurred, or the handicap, disease, or disability of an individual prior to birth would have been prevented, cured, or

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\*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>

ameliorated so that the health and life of the individual was preserved.

The bill would also amend the wrongful death statute to include "unborn child" within the definition of "person" for purposes of the statute, which would allow a wrongful death action for the death of an unborn child caused by the wrongful act or omission of another. "Unborn child" would be defined as a living individual organism of the species *homo sapiens*, in *utero*, at any stage of gestation from fertilization to birth.

The bill would clarify that the provisions of the wrongful death statute would not apply to the death of an unborn child by means of an act committed by the mother, any lawful medical procedure performed by a physician or other licensed medical professional at the request of the pregnant woman or her guardian, the lawful dispensation of administration of lawfully prescribed medication, or a legal abortion.

Both the new section and the amendments to the wrongful death section would include a severability clause.

### **Background**

In the Senate Judiciary Committee, Senator Pilcher-Cook, one of the co-sponsors of the bill, testified in support of the bill. A local attorney and a representative of Kansans for Life also testified in support of the bill. A representative of the Kansas Catholic Conference submitted written testimony supporting the bill. A representative of the Kansas National Organization for Women testified in opposition to the bill. A representative of the ACLU of Kansas and Western Missouri submitted written testimony opposing the bill.

The fiscal note prepared by the Division of the Budget on the bill indicates it would have no fiscal effect on the Kansas Department of Health and Environment or on the judicial branch.

# **EXHIBIT 4**

Kansas Summary of Legislation, 2013 Regular Session, Senate Bill 142

September 25, 2013

Kansas Legislature

2013

**ABORTION**

**Abortion—Civil Actions; SB 142**

**SB 142** creates a new section of law prohibiting civil actions for a claim of wrongful life or wrongful birth. The bill also prohibits recovery of damages in any civil action for any physical condition of a minor that existed at birth if such damages arise out of a claim that a person's action or omission contributed to the minor's mother not obtaining an abortion.

The bill defines "claim of wrongful birth" as a cause of action brought by a parent, guardian, or individual required to provide for the support of a minor seeking damages due to a physical condition of the minor that existed at the time of birth, and which claims a person's action or omission contributed to the minor's mother not obtaining an abortion.

The bill defines "claim of wrongful life" as a cause of action brought by or for a minor seeking damages for the minor due to a physical condition existing at birth, and which claims a person's action or omission contributed to the minor's mother not obtaining an abortion.

The bill clarifies that nothing in the new section should be deemed to create a new cause of action or preclude any otherwise proper cause of action based on a claim that, but for a person's wrongful action or omission, the death or physical injury of the mother would not have occurred, or the handicap, disease, or disability of an individual prior to birth would have been prevented, cured, or ameliorated so that the health and life of the individual was preserved.

The bill also amends the wrongful death statute to include "unborn child" within the definition of "person" for purposes of the statute. This change allows a wrongful death action for the death of an unborn child caused by the wrongful act or omission of another. "Unborn child" is defined as a living individual organism of the species *homo sapiens*, *in utero*, at any stage of gestation from fertilization to birth.

The bill clarifies that the provisions of the wrongful death statute do not apply to the death of an unborn child by means of an act committed by the mother, any lawful medical procedure performed by a physician or other licensed medical professional at the request of the pregnant woman or her guardian, the lawful dispensation or administration of lawfully prescribed medication, or a legal abortion.

Both the new section and the amendments to the wrongful death section include a severability clause.

**Abortion Restrictions and Declaration that Life Begins at Fertilization; HB 2253**

**HB 2253** prohibits certain abortions related to the gender of the unborn child, revises the general and late-term abortion statutes, and declares that the life of each human being begins at fertilization.

***Abortion Solely Because of the Unborn Child's Sex***

The bill prohibits persons from performing or inducing abortions or attempting to perform or induce abortions in instances where the person has knowledge the pregnant woman is seeking an abortion solely on account of the sex of the unborn child.



The bill allows the following persons, unless the pregnancy resulted from the plaintiff's criminal conduct, to obtain appropriate relief in a civil action:

- A woman upon whom an abortion is performed or induced, or upon whom there is an attempt to perform or induce an abortion (in violation of the law enacted by the bill);
- The father, if married to the woman at the time of the abortion; and
- The parents or custodial guardians of the woman, if she has not attained the age of 18 at the time of the abortion.

Relief as applied in the bill includes:

- Money damages for all injuries, psychological and physical, occasioned by the violation;
- Statutory damages equal to three times the cost of the abortion;
- Injunctive relief; and
- Reasonable attorney fees.

The bill further provides that a woman upon whom an abortion is performed cannot be prosecuted under the provisions created by the bill for a conspiracy to violate these provisions pursuant to Kansas law (KSA 2012 Supp. 21-5302). The bill provides that nothing in the provisions is to be construed to create a right to an abortion.

Notwithstanding any provision of the section of law created by the bill, a person will not be allowed to perform an abortion that is prohibited by law.

The bill provides that upon a first conviction for violation of the section of law created by the bill, a person will be guilty of a class A person misdemeanor. Upon a second or subsequent provision, a person will be guilty of a severity level 10, person felony.

"Abortion," as used in the bill, means 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.

#### ***Revised Abortion Statutes; Declaration that Life Begins at Fertilization***

The bill also revises the general and late-term abortion statutes, the Woman's-Right-To-Know Act, and the state tax statutes. In addition, the bill adds a new statutory provision that declares the life of each human being begins at fertilization, with all state laws to be interpreted and construed to protect the rights, privileges, and immunities of the unborn child, subject only to the *U.S. Constitution* and the judicial decisions and interpretations of the U.S. Supreme Court.

The bill further provides that nothing in the new provisions shall apply to an abortion that is necessary to preserve the life of the pregnant woman.

The bill prohibits the use of public funding, tax credits, tax preferences, and state-provided public health care services from being used in any manner to facilitate abortions or in facilities where abortions are performed. The bill clarifies a restriction in the tax credit laws regarding health care deductions and limits a prohibition to include only expenses paid or incurred for abortion coverage.

The bill also prohibits any school district and its employees, agents, and education service providers from offering abortion services. The bill restricts school districts from allowing an abortion services provider and its employees, agents, and volunteers from offering, sponsoring or furnishing any course materials or instruction related to human sexuality or sexually transmitted diseases.

A statute applying to late-term restrictions is amended to include a reference to attempts to perform or induce an abortion as being prohibited. The bill redefines one term currently in statute, "medical emergency," regarding a pregnant woman, and adds these two definitions for the terms "bodily function" and "fertilization" in the general abortion statutes:

- "Medical emergency" regarding a pregnant woman means "a condition that, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to necessitate the immediate abortion of her pregnancy without first determining gestational age to avert the death of the woman or for which a delay necessary to determine gestational age will create serious risk of substantial and irreversible physical impairment of a major bodily function." The concluding new language states that "no condition shall be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function."

- "Bodily function" means physical functions only. The term "bodily function" does not include mental or emotional functions.

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

The Secretary of the Department of Health and Environment (KDHE) is required to provide information about Down Syndrome and other prenatally or postnatally diagnosed conditions and is permitted to authorize and oversee certain activities, including the awarding of grants, contracts or cooperative agreements to eligible entities. Information about counseling assistance for medically challenging pregnancies and perinatal hospice services is required as an addition to a KDHE listing of websites for national perinatal assistance. The Secretary is required to submit a report on or before January 12, 2015, to the Legislature and the Governor on the effectiveness of the grants, contracts and cooperative agreements.

The bill also amends the Woman's Right to Know Act to prescribe new language for signage to be posted in an office, clinic, or other facility in which abortions are performed. Additional new language also is required in certain printed materials to inform pregnant women about the development of an unborn child, legal responsibilities for the unborn child, and a link to the KDHE website materials and organizations to assist the pregnant woman.

The bill addresses the University of Kansas Hospital Authority, and amends the law regarding abortions to allow for an abortion to be performed at the hospital in the case of a medical emergency as defined in the bill. In addition, the bill allows any member of the physician faculty of the University of Kansas School of Medicine to perform abortions whenever an abortion is performed outside the scope of any member's employment and on property not controlled by the University of Kansas Hospital Authority.

The bill includes a severability clause, should any provision or clause be held invalid.

## **AGRICULTURE AND NATURAL RESOURCES**

### **County Fair Recognition; SB 56**

**SB 56** transfers the responsibility of recognizing official county fair associations to the board of county commissioners of the county where the association is located. Previously, that responsibility resided with the Secretary of Agriculture. A new provision of law states a county fair association or livestock show association officially recognized by the Secretary of Agriculture prior to July 1, 2013, retains that official recognition unless it was revoked by a vote of the county commissioners in the county where the association is located. The bill requires the Secretary of Agriculture, prior to January 1, 2014, to notify the board of county commissioners of any county in which the Secretary of Agriculture has recognized an official county fair association.

### **Disease Testing; Poultry Improvement Plan and Domesticated Deer; Sub. for SB 57**

**Sub. for SB 57** creates new law regarding penalties and testing for chronic wasting disease. The bill also amends the law regarding the National Poultry Improvement Plan and domesticated deer.