

## **BILL ANALYSIS**

Senate Research Center  
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C.S.H.B. 15  
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State Affairs  
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Committee Report (Substituted)

### **AUTHOR'S / SPONSOR'S STATEMENT OF INTENT**

C.S.H.B. 15 amends the Women's Right to Know Act, created by H.B. 15, 78th Legislature, Regular Session, 2003, by requiring physicians to provide a sonogram on a pregnant woman before performing an abortion. This better informs the physician about the safest procedure to follow and provides the woman with additional information for making important choices about her reproductive health. The legislation also defines a medical emergency in the event that a pregnancy puts a woman's life at risk.

C.S.H.B. 15 contains language that passed in the House as well as language passed by the Senate in S.B. 16. Constructed under the Woman's Right to Know Act, C.S.H.B. 15 will require a sonogram before any sedatives or anesthesia is administered and at least 24 hours before receiving an abortion, or two hours if the pregnant woman currently resides in a county with a population of 60,000 or less, or lives 100 miles or more from an abortion provider.

A physician or a certified sonographer would be required to provide the sonogram and heartbeat to the pregnant woman and the physician would provide a description of the sonogram image as well. This legislation would also require a physician to provide a geographically indexed list of agencies offering ultrasounds at no cost to the pregnant woman.

This bill does provide a medical emergency exception, noting that the physician may perform an abortion without obtaining informed consent if there is a medical emergency.

C.S.H.B. 15 amends current law relating to informed consent to an abortion.

### **RULEMAKING AUTHORITY**

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Section 171.002, Health and Safety Code, as follows:

Sec. 171.002. New heading: DEFINITIONS. Defines, in this chapter, "abortion provider," "medical emergency," "rural county," and "sonogram." Makes a nonsubstantive change.

SECTION 2. Amends Section 171.012, Health and Safety Code, by amending Subsections (a), (b), and (c) and adding Subsection (a-1), as follows:

(a) Provides that consent to an abortion is voluntary and informed only if:

(1) the physician who is to perform the abortion informs the pregnant woman on whom the abortion is to be performed of:

(A) the physician's name;

(B) the particular medical risks associated with the particular abortion procedure to be employed, including, when medically accurate:

(i) the risks of infection and hemorrhage;

(ii) the potential danger to a subsequent pregnancy and of infertility; and

(iii) the possibility of increased risk of breast cancer following an induced abortion and the natural protective effect of a completed pregnancy in avoiding breast cancer;

(C) the probable gestational age of the unborn child at the time the abortion is to be performed; and

(D) the medical risks associated with carrying the child to term;

(2) the physician who is to perform the abortion or the physician's agent informs the pregnant woman that:

(A) medical assistance benefits may be available for prenatal care, childbirth, and neonatal care;

(B) the father is liable for assistance in the support of the child without regard to whether the father has offered to pay for the abortion; and

(C) public and private agencies provide pregnancy prevention counseling and medical referrals for obtaining pregnancy prevention medications or devices, including emergency contraception for victims of rape or incest;

(3) the physician who is to perform the abortion or the physician's agent:

(A) provides the pregnant woman with the printed materials described by Section 171.014; and

(B) informs the pregnant woman that those materials:

(i) have been provided by the Department of State Health Services (DSHS);

(ii) are accessible on an Internet website sponsored by DSHS;

(iii) describe the unborn child and list agencies that offer alternatives to abortion; and

(iv) include a list of agencies that offer sonogram services at no cost to the pregnant woman;

(4) before any sedative or anesthesia is administered to the pregnant woman and at least 24 hours before the abortion or at least two hours before the abortion if the pregnant woman waives this right by certifying that she currently resides in a rural county or lives 100 miles or more from the nearest abortion provider:

(A) the physician who is to perform the abortion or an agent of the physician who is also a sonographer certified by a national registry of medical sonographers performs a sonogram on the pregnant woman on whom the abortion is to be performed;

(B) the physician who is to perform the abortion displays the sonogram images in a quality consistent with current medical practice in a manner that the pregnant woman may view them;

(C) the physician who is to perform the abortion provides, in a manner understandable to a layperson, a verbal explanation of the results of the sonogram images, including a medical description of the dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of external members and internal organs; and

(D) the physician who is to perform the abortion or an agent of the physician who is also a sonographer certified by a national registry of medical sonographers makes audible the heart auscultation for the pregnant woman to hear, if present, in a quality consistent with current medical practice and provides, in a manner understandable to a layperson, a simultaneous verbal explanation of the heart auscultation;

(5) before receiving a sonogram under Subdivision (4)(A) and before the abortion is performed and before any sedative or anesthesia is administered, the pregnant woman completes and certifies with her signature the election form that contains a certain statement;

(6) before the abortion is performed, the physician who is to perform the abortion receives a copy of the signed, written certification required by Subdivision (5); and

(7) the pregnant woman is provided the name of each person who provides or explains the information required under this subsection.

Deletes existing text providing that except in the case of a medical emergency, consent to an abortion is voluntary and informed only if:

(1) the physician who is to perform the abortion or the referring physician informs the woman on whom the abortion is to be performed of:

(A) the name of the physician who will perform the abortion;

(B) the particular medical risks associated with the particular abortion procedure to be employed, including, when medically accurate:

(i) the risks of infection and hemorrhage;

(ii) the potential danger to a subsequent pregnancy and of infertility; and

(iii) the possibility of increased risk of breast cancer following an induced abortion and the natural protective effect of a completed pregnancy in avoiding breast cancer;

(C) the probable gestational age of the unborn child at the time the abortion is to be performed; and

(D) the medical risks associated with carrying the child to term;

(2) the physician who is to perform the abortion or the physician's agent informs the woman that:

(A) medical assistance benefits may be available for prenatal care, childbirth, and neonatal care;

(B) the father is liable for assistance in the support of the child without regard to whether the father has offered to pay for the abortion;

(C) public and private agencies provide pregnancy prevention counseling and medical referrals for obtaining pregnancy prevention medications or devices, including emergency contraception for victims of rape or incest; and

(D) the woman has the right to review the printed materials described by Section 171.014, that those materials have been provided by the Texas Department of Health and are accessible on an Internet website sponsored by the department, and that the materials describe the unborn child and list agencies that offer alternatives to abortion;

(3) the woman certifies in writing before the abortion is performed that the information described by Subdivisions (1) and (2) has been provided to her and that she has been informed of her opportunity to review the information described by Section 171.014; and

(4) before the abortion is performed, the physician who is to perform the abortion receives a copy of the written certification required by Subdivision (3).

(a-1) Prohibits the facility and any person at the facility, during a visit made to a facility to fulfill the requirements of Subsection (a), from accepting any form of payment, deposit, or exchange or making any financial agreement for an abortion or abortion-related services other than for payment of a service required by Subsection (a). Prohibits the amount charged for a service required by Subsection (a) from exceeding the reimbursement rate established for the service by the Health and Human Services Commission for statewide medical reimbursement programs.

(b) Provides that the information to be provided under Subsections (a)(1) and (2) is prohibited from being provided by audio or video recording and is required to be provided at least 24 hours before the abortion is to be performed orally and in person in a private and confidential setting if the woman does not reside in a rural county, or orally by telephone or in person in a private and confidential setting if the pregnant woman certifies that the woman currently resides in a rural county or lives 100 miles or more from the nearest abortion provider. Deletes existing text requiring that the information required to be provided under Subsections (a)(1) and (2) be provided orally by telephone or in person, and at least 24 hours before the abortion is to be performed.

(c) Requires the physician or the physician's agent, when providing the information under Subsection (a)(3), rather than Subsection (a)(2)(D), to provide the woman with the address of the Internet website on which the printed materials described by Section 171.014 may be viewed as required by Section 171.014(e).

SECTION 3. Amends Subchapter B, Chapter 171, Health and Safety Code, by adding Sections 171.0121, 171.0122, 171.0123, and 171.0124, as follows:

Sec. 171.0121. **MEDICAL RECORD.** (a) Requires that a copy of the signed, written certification received by the physician under Section 171.012(a)(6), before the abortion begins, be placed in the pregnant woman's medical records.

(b) Requires that a copy of the signed, written certification required under Sections 171.012(a)(5) and (6) be retained by the abortion provider until:

(1) the seventh anniversary of the date it is signed; or

(2) if the pregnant woman is a minor, the later of the seventh anniversary of the date it is signed, or the woman's 21st birthday.

Sec. 171.0122. VIEWING PRINTED MATERIALS AND SONOGRAM IMAGE; HEARING HEART AUSCULTATION OR VERBAL EXPLANATION. (a) Authorizes a pregnant woman to choose not to view the printed materials provided under Section 171.012(a)(3) after she has been provided with the materials.

(b) Authorizes a pregnant woman to choose not to view the sonogram images required to be provided to and reviewed with the pregnant woman under Section 171.012(a)(4).

(c) Authorizes a pregnant woman to choose not to hear the heart auscultation required to be provided to and reviewed with the pregnant woman under Section 171.012(a)(4).

(d) Authorizes a pregnant woman to choose not to receive the verbal explanation of the results of the sonogram images under Section 171.012(a)(4)(C) if:

(1) the woman's pregnancy is a result of a sexual assault, incest, or other violation of the Penal Code that has been reported to law enforcement authorities or that has not been reported because she has a reason that she declines to reveal because she reasonably believes that to do so would put her at risk of retaliation resulting in serious bodily injury;

(2) the woman is a minor and obtaining an abortion in accordance with judicial bypass procedures under Chapter 33, Family Code; or

(3) the fetus has an irreversible medical condition or abnormality, as previously identified by reliable diagnostic procedures and documented in the woman's medical file.

(e) Provides that the physician and the pregnant woman are not subject to a penalty under this chapter solely because the pregnant woman chooses not to view the printed materials or the sonogram images, hear the heart auscultation, or receive the verbal explanation, if waived as provided by this section.

Sec. 171.0123. PATERNITY AND CHILD SUPPORT INFORMATION. Requires the physician or an agent of the physician, if, after being provided with a sonogram and the information required under this subchapter, the pregnant woman chooses not to have an abortion, to provide the pregnant woman with a publication developed by the Title IV-D agency that provides information about paternity establishment and child support, including:

(1) the steps necessary for unmarried parents to establish legal paternity;

(2) the benefits of paternity establishment for children;

(3) the steps necessary to obtain a child support order;

(4) the benefits of establishing a legal parenting order; and

(5) financial and legal responsibilities of parenting.

Sec. 171.0124. EXCEPTION FOR MEDICAL EMERGENCY. Authorizes a physician to perform an abortion without obtaining informed consent under this subchapter in a medical emergency. Requires a physician who performs an abortion in a medical emergency to:

(1) include in the patient's medical records a statement signed by the physician certifying the nature of the medical emergency; and

(2) not later than the seventh day after the date the abortion is performed, certify to DSHS the specific medical condition that constituted the emergency.

SECTION 4. Amends Section 171.013(a), Health and Safety Code, as follows:

(a) Requires the physician or the physician's agent to furnish copies of the materials described by Section 171.014 to the pregnant woman at least 24 hours before the abortion is to be performed and to direct the pregnant woman to the Internet website required to be published under Section 171.014(e). Deletes existing text requiring the physician or the physician's agent, if the woman chooses to view the materials described by Section 171.014, to furnish copies of the materials to her at least 24 hours before the abortion is to be performed. Makes nonsubstantive and conforming changes.

SECTION 5. Amends Section 171.015, Health and Safety Code, as follows:

Sec. 171.015. INFORMATION RELATING TO PUBLIC AND PRIVATE AGENCIES. Requires that the informational materials include:

(1) geographically indexed materials designed to inform the pregnant woman of public and private agencies and services that:

(A) are available to assist a woman through pregnancy, childbirth, and the child's dependency, including:

(i) a comprehensive list of adoption agencies;

(ii) a description of the services the adoption agencies offer;

(iii) a description of the manner, including telephone numbers, in which an adoption agency may be contacted; and

(iv) a comprehensive list of agencies and organizations that offer sonogram services at no cost to the pregnant woman;

(B) do not provide abortions or abortion-related services or make referrals to abortion providers; and

(C) are not affiliated with organizations that provide abortions or abortion-related services or make referrals to abortion providers; and, rather than or,

(2) a toll-free, 24-hour telephone number that may be called to obtain an oral list and description of agencies described by Subdivision (1) that are located near the caller and of the services the agencies offer.

Makes nonsubstantive and conforming changes.

SECTION 6. Amends Subchapter A, Chapter 241, Health and Safety Code, by adding Section 241.007, as follows:

Sec. 241.007. COMPLIANCE WITH CERTAIN REQUIREMENTS REGARDING SONOGRAM BEFORE ABORTION. Requires a hospital to comply with Subchapter B, Chapter 171.

SECTION 7. Amends Subchapter A, Chapter 243, Health and Safety Code, by adding Section 243.017, as follows:

Sec. 243.017. COMPLIANCE WITH CERTAIN REQUIREMENTS REGARDING SONOGRAM BEFORE ABORTION. Requires an ambulatory surgical center to comply with Subchapter B, Chapter 171.

SECTION 8. Amends Section 245.006(a), Health and Safety Code, to require, rather than authorize, DSHS to inspect an abortion facility at reasonable times as necessary to ensure compliance with this chapter and Subchapter B, Chapter 171.

SECTION 9. Amends Chapter 245, Health and Safety Code, by adding Section 245.024, as follows:

Sec. 245.024. COMPLIANCE WITH CERTAIN REQUIREMENTS REGARDING SONOGRAM BEFORE ABORTION. Requires an abortion facility to comply with Subchapter B, Chapter 171.

SECTION 10. Amends Section 164.055(a), Occupations Code, as follows:

(a) Requires, rather than authorizes, the Texas Medical Board (TMB) to take an appropriate disciplinary action against a physician who violates Section 170.002 or Chapter 171, Health and Safety Code. Requires, rather than authorizes, TMB to refuse to admit to examination or refuse to issue a license or renewal license to a person who violates that section or chapter.

SECTION 11. Amends Subchapter B, Chapter 164, Occupations Code, by adding Section 164.0551, as follows:

Sec. 164.0551. COMPLIANCE WITH CERTAIN REQUIREMENTS REGARDING SONOGRAM BEFORE ABORTION. Requires a physician to comply with Subchapter B, Chapter 171, Health and Safety Code.

SECTION 12. (a) Provides that the legislature finds the following purposes and justifications for this law:

(1) States have "a substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and childbirth," including mental health considerations. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 882 (1992). "It cannot be questioned that psychological well-being is a facet of health. Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible." Id.

(2) The consideration of an abortion's consequences to a fetus is not contingent on the consideration of the health of the mother. Rather, those considerations provide a stand-alone basis for informed consent legislation. There is "no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health." Id.

(3) In addition to the state's substantial interest in promoting the health and well-being of a pregnant woman, the state also has a "profound interest in potential life" of the unborn fetus. Id. at 878; see also Gonzales v. Carhart, 550 U.S. 124, 125 (2007) (recognizing that the state has a legitimate interest "in protecting the life of the fetus that may become a child").

(4) A statute furthering a state's "legitimate goal of protecting the life of the unborn" by "ensuring a decision that is mature and informed" is permitted "even when in so doing the State expresses a preference for childbirth over abortion." Planned Parenthood, 505 U.S. at 883.

(5) In addition, the Supreme Court has held that "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." Id. at 877. "Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal." Id. at 878.

(6) "The State also has an interest in protecting the integrity and ethics of the medical profession." Washington v. Glucksberg, 521 U.S. 702, 731 (1997). An abortion performed without a medical professional's full disclosure to a pregnant woman of the impact on the fetus and the potential health consequences of an abortion could undermine the woman's trust in medical professionals. This Act is intended to protect the integrity and ethics of the medical profession by establishing clear requirements that are designed to ensure the health and informed consent of a pregnant woman who is contemplating an abortion.

(b) Provides that, therefore, it is the legislature's intent in enacting this Act to further the purposes stated in Subsection (a) of this section.

(c) Provides that, furthermore, with regard to the severability clause contained in this Act, the legislature finds:

(1) As the United States Supreme Court has explained, when reviewing an abortion statute, "the proper means to consider exceptions is by as-applied challenge." Gonzales, 550 U.S. at 167. Moreover, when reviewing abortion statutes, "[t]he latitude given facial challenges in the First Amendment context is inapplicable." Id. See also U.S. v. Salerno, 481 U.S. 739, 745 (1987) ("The fact that [a legislative Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment.").

(2) The United States Supreme Court has made the role of the court clear when reviewing statutes: "It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop." Gonzales, 550 U.S. at 168. "[I]t would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." Id. (quoting U.S. v. Raines, 362 U.S. 17, 21 (1960) (internal quotation marks omitted)). "For this reason, '[a]s-applied challenges are the basic building blocks of constitutional adjudication.'" Gonzales, 550 U.S. at 168 (quoting Richard Fallon, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 128 (2000)).

(3) Severability must be considered not only with respect to certain clauses or provisions of a statute but also with respect to applications of a statute or provision when some of the applications are unconstitutional. See Norman J. Singer, Statutes and Statutory Construction, Section 44.02 (4th ed. rev. 1986).

(4) Severability clauses in federal statutes treat severability of clauses and applications the same. See, e.g., 2 U.S.C. Section 1438 ("If any provision of this chapter or the application of such provision to any person or circumstance is held to be invalid, the remainder of this chapter and the application of the provisions of the remainder to any person or circumstance shall not be affected thereby.");

Section 1103 of the Social Security Act (42 U.S.C. Section 1303); Section 15 of the National Labor Relations Act (29 U.S.C. Section 165); Section 11 of the Railway Labor Act (45 U.S.C. Section 161); Section 14 of the Agricultural Adjustment Act (7 U.S.C. Section 614).

(5) Courts have treated severability of clauses and applications the same. See Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 Harv. L. Rev. 76 (1937).

SECTION 13. Provides that the purposes of this Act include, but are not limited to:

- (1) protecting the physical and psychological health and well-being of pregnant women;
- (2) providing pregnant women access to information that would allow a pregnant woman to consider the impact an abortion would have on her unborn child; and
- (3) protecting the integrity and ethical standards of the medical profession.

SECTION 14. Makes application of the change in law made by this Act prospective to an abortion performed on or after the 30th day after the effective date of this Act.

SECTION 15. Requires the Title IV-D agency to publish the information required by Section 171.056, Health and Safety Code, as added by this Act, not later than the 30th day after the effective date of this Act.

SECTION 16. Provides that every provision of this Act and every application of the provisions in this Act are severable from each other. Prohibits the remainder of this Act and the application of this Act's provisions to all other persons or circumstances, if any application of any provision in this Act to any person or group of persons or circumstances is found by a court to be invalid, from being affected. Requires that all constitutionally valid applications of this Act be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone. Requires that the remaining valid applications, even if a reviewing court finds a provision of this Act invalid in a large or substantial fraction of relevant cases, be severed and allowed to remain in force.

SECTION 17. Effective date: upon passage or September 1, 2011.