

1 HOUSE BILL NO. 544

2 INTRODUCED BY M. MORE

3

4 A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING PREABORTION SCREENING AND COUNSELING;
5 PROVIDING DEFINITIONS; PROVIDING PENALTIES; AND PROVIDING CIVIL REMEDIES FOR VIOLATIONS."

6

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

8

9 NEW SECTION. **Section 1. Short title.** [Sections 1 through 6] may be cited as the "Negligent Screening
10 Act".

11

12 NEW SECTION. **Section 2. Legislative findings.** The legislature finds and declares that:13 (1) the existing standard of care for preabortion screening and counseling is not always adequate to
14 protect the health needs of women;15 (2) clarifying the minimum standard of care for preabortion screening and counseling in statute is a
16 practical means of protecting the well-being of women and may better ensure that physicians and physician
17 assistants are sufficiently aware of each patient's risk profile that they may give each patient a well-informed
18 medical opinion regarding the patient's unique case;19 (3) providing the right to redress against persons who perform illegal abortions or encourage
20 self-abortions is an important means of protecting women's health;21 (4) certain subgroups of women who are at higher risk of experiencing negative reactions associated
22 with abortion may be identified by screening for preexisting risk factors, including but not limited to the perception
23 of feeling pressured to have an abortion, a prior history of mental illness, negative moral beliefs about abortion,
24 and other statistically significant risk factors;25 (5) "the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic
26 responsibility for it must rest with the physician," as declared in the U.S. supreme court ruling in Roe v. Wade;27 (6) only an irresponsible physician or physician assistant would recommend or perform an abortion
28 without first evaluating each individual patient's unique risk profile to determine if the option of abortion is likely
29 to produce more benefits than risks or more risks than benefits or if the risks are negligible;

30 (7) organizations such as planned parenthood of America, the national abortion federation, and the

1 American college of obstetrics and gynecology that train and advise physicians in regard to research findings
2 related to abortion procedures have the resources to:

3 (a) conduct literature reviews that would produce and maintain up-to-date checklists of statistically
4 validated risk factors and abortion-associated risks; and

5 (b) provide the information in the form of printed or computerized checklists that would make the full
6 disclosures of all risks that may be relevant to a reasonable patient in accord with each patient's individual risk
7 profile;

8 (8) insurance companies are able to maintain and provide computerized screening and disclosure
9 programs that would ensure adequate screening and disclosure in order to mitigate liability risks;

10 (9) improved preabortion screening will benefit individual women and public health by reducing:

11 (a) unwanted abortions consented to under duress;

12 (b) unsafe abortions among specific subgroups of high-risk patients; and

13 (c) abortions that are predictably unlikely to produce the benefits some women seek and that women
14 are more likely to profoundly regret; and

15 (10) a minimum standard of care for preabortion screening and counseling is appropriate and necessary
16 to safeguard the health interests of women and to reduce the incidence of abortions that are unsafe, unwanted,
17 or unnecessary and that women may subsequently regret.

18
19 **NEW SECTION. Section 3. Definitions.** As used in [sections 1 through 6], unless the context clearly
20 requires otherwise, the following definitions apply:

21 (1) "Abortion" means the use or prescription of any instrument, medicine, drug, or other substance or
22 device to terminate the pregnancy of a woman with an intention other than to increase the probability of a live
23 birth, to preserve the life or health of the child after live birth, or to remove a dead fetus.

24 (2) "Complication associated with abortion" means any medically credible adverse physical,
25 psychological, or emotional reaction ~~that is significantly associated with~~ TO A LEGALLY INDUCED abortion.

26 (3) (A) "Medically credible", AS APPLIED TO RISK FACTORS AND COMPLICATIONS ASSOCIATED WITH ABORTION,
27 means information BASED ON STUDIES that a reasonable patient may consider relevant to a medical decision
28 regarding induced abortion.

29 (B) A RISK FACTOR OR COMPLICATION IS PRESUMPTIVELY CONSIDERED MEDICALLY CREDIBLE IF IT IS:

30 (I) IDENTIFIED IN AT LEAST ONE STUDY EXAMINING LEGAL ABORTION THAT WAS PUBLISHED IN THE ENGLISH

1 LANGUAGE IN A PEER-REVIEWED JOURNAL INDEXED BY THE UNITED STATES NATIONAL LIBRARY OF MEDICINE'S SEARCH
 2 SERVICES OR IN ANY PEER-REVIEWED JOURNAL INCLUDED IN AN ELECTRONIC DATABASE PRODUCED BY THE AMERICAN
 3 PSYCHOLOGICAL ASSOCIATION FOR ABSTRACTS OF LITERATURE IN THE FIELD OF PSYCHOLOGY AFTER 1973 AND NOT LESS
 4 THAN 12 MONTHS BEFORE THE PREABORTION SCREENING; AND

5 (II) STATISTICALLY VALIDATED TO THE DEGREE THAT LESS THAN A 5% PROBABILITY EXISTS THAT THE IDENTIFIED
 6 STATISTICAL ASSOCIATION IS DUE TO CHANCE.

7 (4) "Medical emergency" means a condition that in the physician's reasonable clinical judgment
 8 complicates the medical condition of a pregnant woman to such a degree that an immediate abortion is necessary
 9 to prevent the death of the mother or the immediate and irreversible loss of a major bodily function.

10 (5) "Negligible risks" mean risks that a reasonable patient would consider to be immaterial to a decision
 11 to undergo an elective medical procedure.

12 (6) "Physician" means a person licensed under Title 37, chapter 3, to practice medicine in this state.

13 (7) "Physician assistant" means a person licensed under Title 37, chapter 20, who has a duties and
 14 delegation agreement that allows the physician assistant to recommend, perform, or assist in the performance
 15 of abortions.

16 (8) (a) "Risk factor" means any medically credible factor, including a physical, psychological, emotional,
 17 demographic, or situational factor, for which there is a significant association with one or more complications
 18 associated with ~~legally induced~~ abortion.

19 (b) Medically credible risk factors include at a minimum any RISK factor listed in any edition of the national
 20 abortion federation's medical textbooks A Clinician's Guide to Medical and Surgical Abortion or Management of
 21 Unintended and Abnormal Pregnancy: Comprehensive Abortion Care or in the 2008 report by the American
 22 psychological association task force on mental health and abortion.

23 ~~————(9) "Relative risk rate" means any medically credible relative risk rate or odds ratio for any adverse~~
 24 ~~physical, psychological, or emotional reaction significantly associated with abortion.~~

25 ~~————(10) "Self-induced abortion" means any abortion or menstrual extraction attempted or completed by a~~
 26 ~~pregnant woman on the woman's body without a prescription from a licensed physician, a physician assistant~~
 27 ~~acting within the prescriptive authority granted by the supervising physician, or an advanced practice registered~~
 28 ~~nurse as defined in 37-8-102 who has prescriptive authority.~~

29 ~~(11)~~(9) "Viable" means the ability of a fetus to live outside the mother's womb with or without artificial aid.

30

1 NEW SECTION. **Section 4. Negligent preabortion screening and counseling.** In addition to any
 2 other requirements under law, it is an act of medical negligence to perform or refer a woman for an IMMEDIATE
 3 abortion, except in the case of a medical emergency, unless the following conditions are met:

4 (1) At least 1 hour prior to the performance of an abortion, a person licensed under this title as a
 5 physician, physician assistant, psychiatrist, psychologist, registered nurse, clinical professional counselor, or
 6 clinical social worker has:

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

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

10 (c) in writing, informed the woman and the physician or physician assistant who is to perform the abortion
 11 of the results of the evaluation. The written evaluation must include at a minimum:

12 (i) the age of the woman;

13 (ii) the stated reason or reasons for requesting the abortion;

14 (iii) a description of any perceived pressures identified in subsection (1)(a);

15 (iv) a checklist identifying both the positive and negative results of the evaluation for each risk factor; and

16 (v) the licensed person's written certification that the woman was informed of the risk factors identified
 17 by the evaluation.

18 (d) provided to the woman and retained in the woman's permanent record a copy of the written
 19 evaluation results and the woman's written certification that the woman personally discussed the risk factors and
 20 any complication associated with abortion with the licensed person who signed the written certification.

21 (2) (a) If any risk factors were identified, the pregnant woman must be informed of ~~the following items~~
 22 EACH MEDICALLY CREDIBLE COMPLICATION ASSOCIATED WITH ABORTION THAT IS ASSOCIATED WITH THE IDENTIFIED RISK
 23 FACTOR with sufficient detail and in a manner that a reasonable person would consider material to a decision to
 24 undergo an elective medical procedure:

25 ~~—— (i) each medically credible complication associated with abortion that is associated with the identified~~
 26 ~~risk factors; and~~

27 ~~—— (ii) any quantifiable relative risk rates whenever relevant data exists.~~

28 (b) The requirements of this subsection (2) may be met by providing the woman with at least 1 hour to
 29 review the information described in this subsection (2) in either a printed or electronic document. If the information
 30 is provided as an electronic document, the woman must be notified of the option to receive a printed copy.

1 (3) The physician or physician assistant recommending or performing the abortion has formed a
2 reasonable medical judgment, documented on the written evaluation described in subsection (1)(c), that:

3 (a) the preponderance of medically credible studies demonstrates that the physical and psychological
4 risks associated with abortion for patients with risk factors similar to the patient's risk factors are negligible risks;

5 (b) continuance of the pregnancy would involve greater risk of injury to the physical or mental health of
6 the woman than if the pregnancy were terminated by induced abortion; or

7 (c) continuance of the pregnancy would involve less risk of injury to the physical or mental health of the
8 woman than if the pregnancy were terminated by induced abortion.

9 (4) If the evaluation required and the information provided under subsection (1) are completed with the
10 aid of a computer program or website, the licensed person signing the written evaluation shall review the results
11 with the woman in person at least 1 hour before the abortion is performed.

12
13 **NEW SECTION. Section 5. Civil remedies.** (1) In addition to any other remedy available under law,
14 a woman who has had an abortion or her survivors may seek the following penalties for the intentional, knowing,
15 or negligent failure to comply with the requirements of [section 4]:

16 (a) actual damages, reasonable attorney fees and costs, and \$10,000 for each failure to screen for a
17 risk factor and each failure to inform the woman of a complication associated with abortion; and

18 (b) recovery for the woman for the death of the unborn child in a wrongful death action under 27-1-513,
19 whether or not the unborn child was viable at the time of the abortion, if a preponderance of evidence shows that
20 the defendant knew or should have known that the patient's consent to the abortion was not informed or not fully
21 voluntary.

22 (2) Except as provided in subsection (3), an action brought pursuant to this section based on a failure
23 to comply with the requirements of [section 4] must be brought no later than 2 years after the screening and
24 assessment required in [section 4] or 2 years after the date the woman becomes or should have been aware that
25 the abortion was the probable or contributory cause of a physical or emotional complication associated with
26 abortion and has recovered from any psychological complication associated with abortion that may have impeded
27 the woman's ability to seek or cooperate with counsel to pursue a civil remedy.

28 (3) In the case of a woman who has died within 1 year of the abortion from a complication related to the
29 abortion, an action under this section must be brought within 2 years of the death.

30 (4) In a civil action brought pursuant to this section:

1 (a) in determining liability and validity of consent, the failure to comply with the requirements of [section
2 4] creates the rebuttable presumption that the woman would not have undertaken the recommended abortion if
3 the defendant had complied with [section 4];

4 (b) the absence of physical injury may not preclude an award of noneconomic damages including pain,
5 suffering, inconvenience, mental suffering, emotional distress, psychological trauma, loss of society or
6 companionship, loss of consortium, injury to reputation, or humiliation associated with the abortion;

7 (c) the fact that a physician does not perform elective abortions or has not performed elective abortions
8 in the past may not automatically disqualify the physician from being an expert witness. A licensed obstetrician
9 or family practitioner who regularly helps women in resolving pregnancy-related medical matters is presumptively
10 qualified to testify as an expert on the screening, counseling, management, and treatment of unwanted or
11 problem pregnancies.

12 (d) the failure to comply with the requirements of [section 4] creates the rebuttable presumption that the
13 negligence was willful and wanton unless the defendant proves by a preponderance of evidence that a lesser
14 mental state applied; and

15 (e) a waiver of the evaluations and notices required under [section 4] is void and unenforceable.

16 (5) It is an affirmative defense to allegations of inadequate disclosure under the standards and
17 requirements of [section 4] that the defendant omitted the contested information because:

18 (a) statistically validated surveys of the general population of women of reproductive age conducted
19 within 3 years before or after the contested abortion demonstrated that less than 5% of women would consider
20 the contested information to be plausible and relevant to an abortion decision; or

21 (b) in the reasonable medical judgment of a licensed mental health professional who examined the
22 patient prior to the abortion, disclosure of the contested information would most likely have been the immediate
23 and direct cause of a severe adverse effect on the physical health of the patient.

24 ~~(6) An alleged risk factor for a complication associated with abortion is presumptively considered to be
25 medically credible and relevant to the abortion decision of a reasonable patient if:~~

26 ~~———(a) at least two peer-reviewed studies identified the risk factor and complication associated with a legally
27 induced abortion and the studies were published in the English language in a peer-reviewed journal indexed by
28 the United States national library of medicine's search services or in any peer-reviewed journal included in an
29 electronic database produced by the American psychological association for abstracts of literature in the field of
30 psychology at least 12 months before the day preabortion screening was provided; and~~

1 ~~_____ (b) the alleged risk factor and complication associated with abortion were statistically validated in at least~~
 2 ~~one of the qualifying studies to the degree that less than a 5% probability exists that the identified statistical~~
 3 ~~association is due to chance.~~

4 ~~_____ (7) (a) In addition to any other available remedy, a woman or her survivors has a cause of action for~~
 5 ~~reckless endangerment against any person who attempts or completes an abortion on the woman or aids or abets~~
 6 ~~the commission of a self-induced abortion, with the exception of a person who is a physician, a physician~~
 7 ~~assistant, an advanced practice registered nurse with prescriptive authority, or a licensed pharmacist filling a~~
 8 ~~prescription.~~

9 ~~_____ (b) Proof of injury is not required to recover an award for reckless endangerment under subsection (7)(a).~~

10 ~~_____ (c) The minimum award for damages under subsection (7)(a) is \$800,000, plus reasonable costs and~~
 11 ~~attorney fees.~~

12 ~~(8)(6)~~ This section applies to:

13 (a) a physician;

14 (b) a physician assistant; and

15 (c) an entity that refers for abortions as a normal part of its business at least 10 times per year.

16

17 **NEW SECTION. Section 6. Construction.** (1) [Sections 1 through 6] may not be construed as:

18 (a) creating or recognizing a right to abortion; or

19 (b) defining the standard of care for any medical procedures other than induced abortion.

20 (2) It is not the intention of [sections 1 through 6] to make lawful an abortion that is otherwise unlawful
 21 or to make unlawful an abortion that is otherwise lawful.

22 (3) A violation of [section 4] does not provide grounds for any criminal action or disciplinary action by a
 23 state agency or state licensing authority against any person.

24

25 **NEW SECTION. Section 7. Codification instruction.** [Sections 1 through 6] are intended to be codified
 26 as an integral part of Title 37, chapter 2, and the provisions of Title 37, chapter 2, apply to [sections 1 through 6].

27

28 **NEW SECTION. Section 8. Severability.** If a part of [this act] is invalid, all valid parts that are severable
 29 from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part
 30 remains in effect in all valid applications that are severable from the invalid applications.

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