

BILL ANALYSIS

H.B. 3218
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Public Health
Committee Report (Unamended)

BACKGROUND AND PURPOSE

A number of states have laws in place to prevent discriminatory abortions performed due to the race, ethnicity, sex, or probability of having or diagnosis of a severe disability of a preborn child. There are concerns that, when a diagnosis of a severe fetal abnormality is made and survival outside of the womb is unlikely, abortion may be seen as the only option. Making women aware of the availability of perinatal palliative care programs as another option would be beneficial. To ensure that a woman does not have an abortion for a discriminatory reason, H.B. 3218 seeks to prohibit certain discriminatory abortions and certain late-term abortions based on fetal abnormality, while maintaining an exception for medical emergencies, and to provide perinatal palliative care information to a pregnant woman at the time of diagnosis of a life-threatening disability in the preborn child so the woman is fully informed about her health care options.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill expressly does one or more of the following: creates a criminal offense, increases the punishment for an existing criminal offense or category of offenses, or changes the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the executive commissioner of the Health and Human Services Commission in SECTION 20 of this bill.

ANALYSIS

H.B. 3218 amends the Health and Safety Code to require the Health and Human Services Commission (HHSC) to develop and post on its website informational materials about perinatal palliative care, defined by the bill as the provision of comprehensive, supportive care to reduce the suffering of a pregnant woman, her preborn child, and her family, from diagnosis of the preborn child's life-threatening disability through the delivery and possible death of the child as a result of the life-threatening disability. Perinatal palliative care includes medical, social, and mental health care, including counseling and health care provided by maternal-fetal medical specialists, obstetricians, neonatologists, anesthesia specialists, specialty nurses, clergy, social workers, and other individuals focused on alleviating fear and pain and ensuring the pregnant woman, her preborn child, and her family experience a supportive environment. The bill defines "preborn child" by reference.

H.B. 3218 requires the informational materials to include a description of the health care and other services available through perinatal palliative care and information about medical assistance benefits that may be available for prenatal care, childbirth, and perinatal palliative care. The bill, with respect to the informational materials:

- requires HHSC to develop, regularly update, and publish a geographically indexed list of all perinatal palliative care providers and programs in Texas;

- requires HHSC to post the geographically indexed list on its website and to note the perinatal palliative care providers and programs that provide services free of charge;
- authorizes HHSC to include on the list perinatal palliative care providers and programs in other states that provide care to Texas residents but prohibits HHSC from including an abortion provider or an affiliate of an abortion provider, as defined by state law;
- requires HHSC, not later than December 1, 2021, to develop the perinatal palliative care informational materials and list of perinatal palliative care providers and programs; and
- requires HHSC, not later than December 1, 2021 to develop a form on which a pregnant woman certifies that she has received the perinatal palliative care informational materials and the list of the perinatal palliative care providers and programs.

H.B. 3218 requires a health care provider who diagnoses a pregnant woman's preborn child as having a life-threatening disability to do the following at the time of the diagnosis:

- provide the woman with a written copy of the perinatal palliative care informational materials and list of perinatal palliative care providers and programs and the certification form;
- obtain from the woman the signed certification form; and
- place the form in the woman's medical records.

H.B. 3218 exempts a health care provider from the requirement to provide the informational materials or certification form if the provider verifies the pregnant woman's medical record contains a signed certification form for that pregnancy. The bill establishes the purpose of its perinatal palliative care provisions.

H.B. 3218 replaces certain references to an unborn child with references to a preborn child in provisions relating to the following:

- prohibited acts regarding abortion;
- voluntary and informed consent to an abortion;
- prohibited practices by a physician or an applicant for a license to practice medicine;
- post-fertilization age;
- method of abortion;
- the election form to be signed by a pregnant woman as a condition of establishing voluntary and informed consent to an abortion; and
- the Preborn Pain Act.

H.B. 3218 revises the exemptions from the prohibition against a person intentionally or knowingly performing an abortion on a woman who is pregnant with a preborn child during the third trimester of the pregnancy that are contingent on the person performing the abortion being a physician who concludes in good faith according to the physician's best medical judgment that certain conditions regarding the pregnancy exist. The bill, in making those revisions with respect to those conditions:

- replaces the condition that the abortion is necessary to prevent the death or a substantial risk of serious impairment to the physical or mental health of the woman with a condition that the abortion is instead necessary due to a medical emergency that is a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed;
- removes as a condition that the fetus is not a viable fetus and the pregnancy is not in the third trimester; and
- removes as a condition that the fetus has a severe and irreversible abnormality, identified by reliable diagnostic procedures.

H.B. 3218 creates a Class A misdemeanor offense for a person who:

- knowingly performs or attempts to perform on a pregnant woman an abortion based on the race, ethnicity, sex, or disability of the woman's preborn child, including a probability

of diagnosis that the child has a disability; or

- uses force or the threat of force to intentionally injure or intimidate a person to coerce the performance or attempted performance of an abortion based on any such factor.

The bill defines "disability" for purposes of its provisions relating to a prohibited discriminatory abortion as:

- a physical or mental impairment that would substantially limit one or more of an individual's major life activities;
- an assessment referencing such an impairment of an individual; or
- a physical disfigurement, scoliosis, dwarfism, Down syndrome, albinism, amelia, or any other type of physical, mental, or intellectual abnormality or disease.

H.B. 3218 prohibits a woman on whom the discriminatory abortion is performed or attempted from being prosecuted for the violation or for conspiracy to commit the violation.

H.B. 3218 establishes that a physician who performs a discriminatory abortion engages in unprofessional conduct for which the physician's license may be suspended or revoked under the Medical Practice Act. The bill authorizes a civil action to be brought against a person who commits an offense of discriminatory abortion by the following persons:

- the woman on whom a discriminatory abortion was performed or attempted;
- the father of the preborn child, unless the woman's pregnancy resulted from the father's criminal conduct; or
- a maternal grandparent of the preborn child if the pregnant woman was less than 18 years of age at the time the discriminatory abortion was performed or attempted, unless the woman's pregnancy resulted from the maternal grandparent's criminal conduct.

The bill authorizes a person who brings such a civil action to obtain, in addition to any other remedy available by law:

- injunctive relief;
- damages incurred by the person, including:
 - actual damages for all psychological, emotional, and physical injuries resulting from the applicable violation;
 - court costs; and
 - reasonable attorney's fees; or
- both injunctive relief and damages.

The bill requires such an action to be filed:

- in a district court in the county in which the woman on whom the discriminatory abortion was performed or attempted resides; and
- not later than the sixth anniversary of the date the discriminatory abortion was performed or attempted.

The bill prohibits a civil action from being brought against a woman on whom the discriminatory abortion is performed or attempted.

H.B. 3218, with respect to the requisite elements contributing to consideration of a woman's consent to an abortion as voluntary and informed:

- requires information on state law regarding the prohibition on discriminatory abortion to be given to the pregnant woman by the physician;
- revises the contents of the abortion and sonogram election form the pregnant woman must complete and certify with her signature before any sedative or anesthesia is administered; and
- with regard to the identification of the source of certain information to be provided by a physician to a woman, replaces the Department of State Health Services with HHSC as the source of that information.

H.B. 3218, in provisions relating to voluntary and informed consent, requires a physician who is to perform an abortion on a pregnant woman whose preborn child has been diagnosed with a life-threatening disability, at least 24 hours before the abortion or at least two hours before the abortion if the pregnant woman waives the requirement by certifying that she currently lives 100

miles or more from the nearest abortion provider or a facility in which more than 50 abortions are performed in a 12-month period, to do the following:

- inform the woman, orally and in person, of the availability of perinatal palliative care; and
- provide the pregnant woman with a written copy of the perinatal palliative care informational materials and the list of perinatal palliative care providers and programs and the perinatal palliative care certification form required by the bill's provisions.

H.B. 3218, in provisions relating to voluntary and informed consent, establishes that, if a pregnant woman whose preborn child has been diagnosed with a life-threatening disability and who has received the informational materials and certification form chooses to have an abortion instead of continuing the pregnancy in perinatal palliative care, the physician may perform the abortion only after the pregnant woman signs the certification form and the physician places the signed form in the pregnant woman's medical records.

H.B. 3218 requires a copy of the signed perinatal palliative care certification form to be placed in the pregnant woman's medical records, if applicable, before an abortion begins and requires a copy of that certification to be retained by the facility where the abortion is performed until the seventh anniversary of the date the certification is signed or, if the pregnant woman is a minor, the later of the seventh anniversary of the date the certification is signed or the woman's 21st birthday.

H.B. 3218 includes in the informational materials that the applicable health and human services agency is required to publish in regard to voluntary and informed consent the informational materials regarding state law prohibiting discriminatory abortion and the informational materials regarding perinatal palliative care.

H.B. 3218 amends the Occupations Code to include among the prohibited practices whose commission by a physician or an applicant for a license to practice medicine is grounds for disciplinary action or refusal to issue a license the performance or attempted performance of an abortion or engaging in other conduct in violation of the bill's prohibition on discriminatory abortions. The bill makes the criminal penalties imposed for practicing medicine in violation of the Medical Practice Act inapplicable to a violation of that prohibition.

H.B. 3218 requires HHSC, not later than December 1, 2021, to update any forms and informational materials relating to informed consent for an abortion as necessary and requires the executive commissioner of HHSC to adopt any rules necessary to implement the bill's provisions relating to perinatal palliative care and the changes in law made by the bill related to informed consent for an abortion. The bill's provisions apply only to a diagnosis of a life-threatening disability of a pregnant woman's preborn child made on or after January 1, 2022, or to an abortion performed, induced, or attempted or other conduct that occurred on or after January 1, 2022, as applicable. The bill sets out certain legislative findings and provides for the intent and severability of its provisions.

H.B. 3218 repeals the following provisions of the Health and Safety Code:

- Section 171.046(c); and
- Sections 285.202(a-1) and (a-2).

EFFECTIVE DATE

September 1, 2021.