SUBJECT: Requiring informed consent from a woman before abortion

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 7 ayes — Marchant, Madden, J. Davis, B. Cook, Elkins, Gattis, Lewis

1 nay — Villarreal

1 absent — Goodman

WITNESSES: For — Cathie Adams, Texas Eagle Forum; Dr. Linda Flower, Texas Physicians' Resource Council; Mike Hannesschlager, Texas Christian Coalition; Margaret Hotze, The Life Advocates; David Muralt, Citizens for Excellence in Education; Myra Myers, Silent No More and Operation Outcry; 12 individuals; *(Registered, but did not testify:)* approximately 240 individuals

Against — Melissa DeHaan, The Lilith Fund; Jennifer Hixon, Voices for Choice; Elizabeth Marrero, National Association of Social Workers; Kae McLaughlin, Texas Abortion and Reproductive Rights Action League; Lesley Ramsey, Texas Campaign for Women's Health; Hannah Riddering, Texas National Organization for Women; Peggy Romberg, Women's Health and Family Planning Association of Texas; Vicki Hansen; Jim Rigby; *(Registered, but did not testify:)* approximately 60 individuals

On — Richard Bays, Texas Department of Health; Sarah Garcia, American Cancer Society; *(Registered, but did not testify:)* Lonny Stern

BACKGROUND: Health and Safety Code, ch. 170 governs abortions, as does Family Code, ch. 33 for minors. Health and Safety Code, ch. 245 is the Texas Abortion Facility Reporting and Licensing Act. The Texas Department of Health (TDH) administers Health and Safety Code provisions on abortion.

Under Health and Safety Code, sec. 245.005, a licensed physician's office need not be licensed specifically to provide abortions unless the office performs more than 300 elective abortions in any 12-month period.

DIGEST:

CSHB 15 would add Health and Safety Code, ch. 171, called the Woman's Right to Know Act. It would specify that only a licensed physician may perform an abortion and would require that an abortion of a fetus age 16 weeks or older be performed at an ambulatory surgical center or hospital licensed to perform an abortion.

An abortion provider would have to obtain the voluntary and informed consent of a woman receiving an abortion, except in a medical emergency. At least 24 hours before the abortion, the physician who was to perform the abortion or the referring physician would have to inform the woman orally, either by telephone or in person, of:

- the name of the physician performing the abortion;
- medical risks associated with abortion, including infection and hemorrhage;
- danger to subsequent pregnancy and risk of infertility;
- increased risk of breast cancer and the natural protective effect of a completed pregnancy in avoiding breast cancer;
- probable gestational age of the unborn child at the time of abortion;
- medical risks associated with carrying a child to term;
- medical assistance that might be available for mother and baby care;
- the father's liability for paying child support;
- contraception counseling and referrals available from public and private agencies;
- the woman's right to review TDH materials that describe the unborn child and that list agencies offering alternatives to abortion; and
- the website address for viewing TDH materials online.

Before the abortion, the woman would have to certify in writing that she had received the above information, and the physician who was to perform the abortion would have to receive a copy of the written certification.

TDH would have to prepare informational materials as listed above and would have to publish them by December 1, 2003, in English and Spanish, in an easily comprehensible form and in a clearly legible typeface. The materials would have to be available from TDH upon request, at no charge, and in appropriate quantities. TDH would have to review the materials annually for content changes. TDH also would have to protect its website from alteration

from outside the agency and would have to monitor the website daily to prevent and correct tampering. The TDH materials would have to:

- describe the unborn child's probable anatomical and physiological characteristics at two-week gestational increments, including the possibility of the unborn child's survival;
- include nonjudgmental, realistic color pictures and dimensions of the child at two-week gestational increments;
- list agencies that offer alternatives to abortion;
- include either geographically indexed information on agencies to help a woman through pregnancy, childbirth, and the child's dependency or a toll-free, 24-hour phone number from which a person could obtain this information; and
- comprehensively list adoption agencies, describe their services, and provide contact information.

The materials could not give information on agencies that provide abortions or related services or that make referrals to abortion providers, or on any agency affiliated with such an organization.

If a woman chose to view the TDH materials, they would have to be provided to her at least 24 hours before the abortion, or 72 hours before the abortion if the materials were mailed. A doctor would not have to provide the materials to a woman who had certified in writing that she chose to view the materials online. Doctors could disassociate themselves from the materials and could choose to comment on them or refrain from commenting.

A physician who intentionally performed an abortion in violation of CSHB 15 would commit a misdemeanor punishable by fine of up to $10,000. TDH would have to assess fees in amounts reasonable and necessary to cover the costs of enforcing the statute from licensed abortion facilities.

CSHB 15 would amend the Texas Abortion Facility Reporting and Licensing Act to exempt a licensed ambulatory surgical center from abortion licensing requirements. It would specify that a physician's office is exempt from abortion licensing requirements unless the office is used "substantially" for the purpose of performing abortions, defined as having applied for an abortion facility license or:

- performing at least 10 abortions during any month or at least 100 abortions in a year;
- operating less than 20 days a month and performing a number of abortions equivalent to at least 10 in a month if the office operated at least 20 days a month; or
- advertising itself as an abortion provider.

For an unemancipated minor for whom the Family Code required parental notification of an abortion, the 24-hour periods established by CSHB 15 could run concurrently with the notification period under that statute.

The bill would take effect September 1, 2003, and would apply to abortions performed on or after January 1, 2004.

SUPPORTERS SAY:

Abortion is the most common surgical procedure performed on women and has been for at least 20 years. CSHB 15 would ensure that women seeking abortion would receive the same kind of medically accurate information they would receive for any surgical procedure, including risks, benefits, and the chance for a second opinion. The bill would protect women's health by making sure that if they chose abortion, they would do so in a fully informed manner. It would allow women to take charge of their health care and their own lives and would help protect abortion providers from litigation.

This legislation would be similar to other disclosure laws that help consumers make informed choices. For example, the 75th Legislature in 1997 enacted HB 723 by Dukes, et al., requiring a woman's informed consent for a hysterectomy. If a woman did not want the TDH material required by this bill, she would not have to receive it, but the information at least would enable her to rethink her decision.

Though women currently have to give their consent before nonemergency abortions, they may not be well informed about their choices. The existing statute has no teeth and is not enforced. Clinics often conduct only perfunctory counseling sessions before abortions and rush women through the process without ensuring that they understand the information and have considered their options. Many women seeking abortion never receive complete information about what the procedure will entail or about its possible health risks. Some women say they would not have had an abortion if

they had known more about the procedure, their unborn child, or the post-procedure medical complications. Informing a woman of her unborn child's gestational development could reduce the number of abortions, because the woman might realize that she was making a decision that involved another human being, not merely an undeveloped piece of tissue. Also, the abortion procedure itself can be very painful, though clinic staff often do not prepare women adequately or else tell them overtly that abortion is relatively painless.

CSHB 15 would help protect women from post-abortion trauma. Many women seek abortions within only a few days of discovering their pregnancy, and they may not have considered their decisions thoroughly. Typically they are confused and scared. It can take years for a woman's grief to surface, but it then can manifest itself in nightmares, flashbacks, self-mutilation, panic attacks, abuse, and eating disorders. Some studies show that a majority of women who have had abortions experience problems with grief and that women who have not thought through their decisions show more symptoms of grief. Many times, a woman's grief about an abortion will surface when she later gives live birth.

Studies show that the risk of suicide is almost six times higher in women who have had abortions than in those who have had live births and that women who have had abortions are twice as likely to seek mental health treatment. These women also report abuse of alcohol and drugs and difficulty in relationships and in bonding with future children.

Some in the abortion industry are more interested in making a profit than in women's health. Many abortion facilities do not have the medical equipment to deal with complications and are underregulated compared to providers of other surgical procedures. It is wrong to allow the industry to take advantage of women who are vulnerable and in the crisis of an unplanned pregnancy.

The waiting period required by the bill would not make abortions more expensive. Information could be given over the phone, and a woman would not have to wait in the town of the abortion clinic for 24 hours. She could wait wherever she lived, so the bill should not affect her travel expenses and lost work time.

CSHB 15 would make an abortion safer for a woman who sought the procedure at 16 weeks of pregnancy or later by requiring that her abortion be performed in an ambulatory surgical center or hospital, where standards of care are higher — an important consideration in later-term abortions that have a higher risk of complications. Though some assert that abortions performed in ambulatory surgical centers are more expensive than those performed in clinics, the primary driver of the expense is the gestational age of the child, not the type of abortion facility. The U.S. Supreme Court has upheld such a provision in a Virginia law. The committee substitute would exempt ambulatory surgical centers from additional licensing requirements, since they already are regulated more heavily.

Many studies have been conducted regarding the link between elective abortion and breast cancer. Though the results contradict each other and are controversial, women deserve to know about the possibility of such a link. Patients are informed routinely of risk factors associated with surgery, even if the risk is small. Information about the possibility of breast cancer following an abortion should not be an exception.

CSHB 15 is similar to legislation in 30 other states upheld by the U.S. Supreme Court in *Planned Parenthood v. Casey*. The court found that the 24-hour reflection period is reasonable because it increases the likelihood that an important decision will be more informed and deliberate.

TDH already has a pamphlet with much of the information that CSHB 15 would require, developed in response to the parental notification requirements enacted by the 76th Legislature in 1999. Therefore, this bill would create minimal costs and effort for TDH. In fact, for the fiscal 2004-05 biennium, the bill would have a net positive impact on the state's resources. In structuring fees to cover the costs of implementation, TDH would not have to charge a flat fee to all abortion facilities. It could base a facility's fee on the number of abortions that it performs.

OPPONENTS SAY:

CSHB 15 is based on the erroneous and patronizing assumption that women are making uninformed choices. The Texas Medical Practice Act already requires informed consent for all surgical procedures, including abortion. Most women have a sonogram before an abortion and have the opportunity to

see fetal development pictures. TDH also inspects abortion clinics once a year and verifies that pre-surgery counseling complies with the law.

Making informed decisions is a solid policy goal. However, the information that this bill would require doctors to provide to women is biased and, in some instances, medically inaccurate. If the bill's purpose truly was to help women make informed choices, it would require that women receive a much broader and more objective set of information. The real intent of this legislation is not to help women make informed choices, but to exaggerate the difficulty of receiving an abortion so that women are influenced by time, cost, or fear not to undergo the procedure, even when it is medically recommended.

The information required by the bill would emotionalize a woman's decision inappropriately. For example, no justification exists to require color pictures of fetal development when black-and-white pictures convey the equivalent information. The reason for requiring color would be to bias a woman against abortion rather than to help her make the decision that is best for her. Women would be singled out for different treatment, as there is no surgical procedure unique to men for which the law requires the patient to view color pictures.

The bill reflects misinformation. Women who make their own choices about pregnancy freely are the happiest and least traumatized. Studies show that only about 3 percent of women who abort have post-abortion depression, whereas twice that percentage of women who give live birth have post-partum depression. Furthermore, studies have shown that abortion is ten times safer than carrying a baby to term.

No scientific evidence supports a link between breast cancer and abortion. Requiring TDH to distribute misinformation based on bad science would undermine the agency's credibility. If the goal of CSHB 15 is to inform women correctly, it should require TDH to provide only accurate, scientifically sound information.

CSHB 15 should have retained the requirement in the original bill that TDH materials contain information on contraception and its proper use. This truly would help to reduce the number of abortions by reducing the number of unwanted or unplanned pregnancies. If the materials are required to inform a woman that the baby's father is liable for payment of child support, they also

should include statistics from the Attorney General's Office showing the low rates of compliance with child-support orders.

The bill would be burdensome on women seeking abortions, particularly poor and young women. The mandatory waiting time could result in higher costs for child care, hotel rooms, and travel for a woman who had to travel to another city to obtain abortion services. In practice, women must wait more than 24 hours anyway, because most clinics take several days before they have an appointment available.

The bill would make abortions after 16 weeks more expensive by requiring that they be performed in an ambulatory surgical center or hospital. Having an abortion in an ambulatory center does not guarantee better care, though it costs more. Most abortions after 16 weeks of pregnancy occur because of medical difficulties, so limiting access to abortion after the 16th week to ambulatory surgical centers would create a barrier to access. No valid medical reason exists for such a requirement. Studies by governmental entities have shown that clinics have demonstrated a record of safety.

Requiring more doctor's offices to have a special license to perform abortions would be burdensome and duplicative. This proposal would create another barrier to access to abortion by making it not worthwhile for doctors who perform only a few abortions to go through the process of becoming licensed. The cumulative effect of the barriers inherent in CSHB 15 would be to make abortion, for all practical purposes, inaccessible, a *de facto* reversal of *Roe v. Wade*. A right with no access is no right at all.

The Legislature should not establish a criminal penalty for the legitimate practice of a legal and well-regulated medical service. Restricting a doctor's freedom to perform a legal service simply would endanger patients' health.

The primary component of CSHB 15 that the U.S. Supreme Court has upheld is the 24-hour waiting period. Some of the bill's other provisions are unlike laws in other states and may not be constitutional.

About four new entities would have to be licensed under this bill, creating an extra strain on TDH staff and fiscal resources. It would be especially burdensome on licensed abortion clinics and doctor's offices because they

would have to pay higher fees to cover the cost of implementation. About 45 licensed facilities across the state would fall into this category. With implementation costs estimated at $200,000 per year, the average fee of $4,500 per facility, in addition to the current $2,500 fee, clearly would be burdensome. Under the higher fee structure, some doctors and clinics that currently perform abortions may cease doing so. Fewer providers would decrease women's access to abortion services and would raise the fee assessed on remaining providers.

OTHER OPPONENTS SAY:

CSHB 15 would not go far enough. It also should require a post-abortion pathology report, as for any surgery in which a person's tissue is removed.

NOTES:

As filed, HB 15 would have required TDH materials to include information describing methods of preventing pregnancy, including pictures or diagrams illustrating the proper use of each method. The committee substitute also differs from the filed bill in that it would add a requirement for information on the risk of breast of cancer; require that TDH materials exclude agencies that perform abortions; exempt licensed ambulatory surgical centers from additional licensing requirements; require TDH to assess fees to cover implementation costs; and delete a requirement that an abortion facility not be located near a church or school.

The companion bill, SB 835 by Williams, has been referred to the Senate State Affairs Committee.