SUBJECT: Requiring a sonogram before an abortion

COMMITTEE: State Affairs — committee substitute recommended

VOTE: (*After recommitted*:)
9 ayes — Cook, Craddick, Frullo, Geren, Harless, Hilderbran, Huberty, Smithee, Solomons

3 nays — Menendez, Oliveira, Turner

1 absent — Gallego

WITNESSES: None

BACKGROUND: Under Health and Safety Code, ch. 171, subch. B, the Woman's Right to Know Act, a person may not perform an abortion without the voluntary and informed consent of the woman on whom the abortion is to be performed.

Informed consent. For consent to be informed and voluntary, the woman must be informed:

- of the name of the physician who will perform the abortion;
- of the risks associated with abortion and with carrying the child to term;
- of the probable gestational age of the unborn child at the time the abortion is to be performed;
- that assistance is available for prenatal and neonatal care and childbirth;
- of the father's liability for child support;
- that public and private agencies provide pregnancy prevention counseling and medical referrals; and
- that the woman has a right to review printed materials provided by the Department of State Health Services (DSHS) and that the materials describe the unborn child and list agencies that offer alternatives to abortion.

Before the abortion, the woman must certify in writing that she received the above information, and the physician who is to perform the abortion must receive and retain a copy of this certification. The information must be provided to the woman orally, by telephone, or in person and at least 24 hours before the abortion is performed.

Offense. A physician who intentionally performs an abortion on a woman in violation of the informed consent requirements commits a misdemeanor punishable by a fine of not more than $10,000.

DIGEST:

CSHB 15 would amend Health and Safety Code, ch. 171, by adding subch. C to require a physician who is to perform an abortion or a sonographer certified by a national registry of medical sonographers, not more than 72 hours and not less than 24 hours before the abortion and before any sedative or anesthesia was administered, to:

- perform a live, real-time obstetric sonogram on the pregnant woman on whom the abortion was to be performed;
- display the live, real-time obstetric sonogram images in a manner that the pregnant woman could view;
- provide a simultaneous verbal description 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 arms, legs, external members, and internal organs; and
- make audible the live, real-time heart tones, when present, for the pregnant woman to hear and provide a simultaneous verbal explanation of the live, real-time fetal heart tones.

Certification. After the sonogram and heart auscultation (providing audible heart tones), and before any sedative or anesthesia was administered to the pregnant woman and before the abortion began, the woman would have to certify by her signature that, not more than 72 hours and not less than 24 hours before the abortion began:

- the physician who was to perform the abortion or a certified sonographer performed a sonogram and provided her with live, real-time images so she could view them, and she was provided a simultaneous verbal explanation of the images; and

- the physician who was to perform the abortion or a certified sonographer made audible the live, real-time fetal heart tones, when present, and she was provided a simultaneous verbal explanation of the live, real-time heart activity.

DSHS would be required to prepare a form to be used for certification by the pregnant woman that included a space for her signature and space for her to sign her initials beside statements describing the information and services she was provided.

Before the abortion began, a copy of the form would have to be given to the physician who was to perform the abortion and placed in the woman's medical records. A copy of the form would have to be retained by the abortion provider until the seventh anniversary of the date it was signed, or if the woman were a minor, until the later of the seventh anniversary of the date it was signed or the woman's 21st birthday.

Payment. During a visit to a facility for a sonogram and heart auscultation required by the bill, the facility or a person at the facility could not accept payment or make a financial agreement for an abortion or abortion-related services other than the sonogram and heart auscultation. The amount charged for the sonogram and heart auscultation could not exceed the reimbursement rate established by the Health and Human Services Commission for statewide medical reimbursement programs.

Informational materials. The physician would be required, not more than 72 hours and not less than 24 hours before an abortion, to:

- provide the pregnant woman on whom the abortion was to be performed with the informational materials she has the right to view under current law and inform her that the materials were accessible on an Internet website sponsored by the Department of State Health Services (DSHS) and that they described the unborn child and listed agencies offering alternatives to abortion; and
- provide her with a comprehensive list of health care providers, facilities, and clinics that offered obstetric sonogram services at no cost to the woman and did not perform abortions, provide abortion services, make referrals to abortion providers, or affiliate with any entity that performs abortions or makes referrals to abortion providers.

DSHS would be required to compile the list of providers, facilities, and clinics to be provided by the physician who was to perform an abortion. The department would have to make the list available at no cost and provide appropriate quantities to abortion providers. The list would have to include the name, address, hours of operation, and telephone number for each provider, facility, and clinic satisfying the requirements to be included. The list would have to be arranged by county, printed in large enough typeface to be legible, and be published in English and Spanish. The department would not have to republish the list because of a change in information unless at least 5 percent of the information in the list changed.

Medical emergency. A physician could perform an abortion without providing a sonogram only in a medical emergency, which would be defined in the bill as a life-threatening physical condition caused by or arising from the pregnancy itself that, as certified by a physician, placed the woman in danger of death or serious risk of substantial impairment of a major bodily function unless an abortion were performed.

A physician who performed an abortion in a medical emergency would be required to include a signed statement in the patient's medical records certifying the nature of the medical emergency. No later than seven days after the abortion was performed, the physician would have to certify to DSHS the specific medical condition that constituted the emergency.

A copy of the form certifying the nature of the medical emergency would have to be retained by the abortion provider until the seventh anniversary of the date the abortion was performed, or if the woman were a minor, until the later of the seventh anniversary of the date of the abortion or the woman's 21st birthday.

Penalty. A physician who performed an abortion in violation of the bill would be considered as having engaged in unprofessional conduct, for which the physician's license would have to be revoked under Occupations Code, ch. 164, which governs physician disciplinary actions and procedures.

The physician and the pregnant woman would not be subject to penalty under the bill solely because the woman chose not to receive the information required to be provided.

Severability. The bill would specify that if any provision of the bill or its application were to be held invalid, it would not affect the bill's other provisions or applications that still could be given effect.

Effective date. CSHB 15 would take immediate effect if finally passed by a two -thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2011. The bill would apply only to abortions performed on or after the 60th day after the effective date.

SUPPORTERS SAY:

CSHB 15 would help to ensure that a woman deciding whether to have an abortion had access to all of the medical information that could inform her decision, including an obstetric sonogram, fetal heart auscultation (providing audible heart tones), and simultaneous verbal descriptions of each of these. This information would give a woman a clearer view of what she is choosing with an abortion and who was affected by the choice.

The bill would provide women seeking abortions with the same kind of medically accurate information they would receive for any surgical procedure, including risks and benefits. CSHB 15 would protect women's health, ensuring that if a woman chose abortion, she did so in a fully informed manner. If a woman chose not to view the sonogram image, she would not be required to do so.

Women should be able to change their minds before having an abortion, and all medical treatments pertaining to the procedure, including a sonogram and fetal heart auscultation, should be made available to a woman in making her decision. Clinics often conduct only perfunctory counseling sessions before abortions and rush women through the process without ensuring that they have a chance to understand the information and consider their options. Some women say they would not have had an abortion if they had known more about the procedure and the development of the unborn child. Informing a woman fully of her unborn child's gestational development through sonogram images, audible fetal heart auscultation, and verbal descriptions of each of these could reduce the number of abortions because it would demonstrate more graphically the unborn child's development and humanity.

Sonograms and fetal heart auscultations are educational aides that make it easier to understand the abortion procedure. They can transcend language barriers as well as potential educational and cultural differences between a

patient and physician, providing an invaluable resource for the pregnant woman in making a decision about abortion.

Performing a sonogram already is the standard of care before an abortion procedure, and this bill would only formalize that standard. It would create uniformity so that all women had the option to view the sonogram if they chose to do so.

CSHB 15 would be constitutionally sound. Under its1992 *Planned Parenthood v. Casey* decision, the U.S. Supreme Court said that because of the state's profound interest in potential life, it may take measures to ensure that a woman's choice is informed. Measures designed to advance that interest are not invalid if their purpose is to persuade the woman to choose childbirth over abortion.

The penalty of mandatory license revocation for a physician who violated the requirements of CSHB 15 would be a sufficient deterrent to ensure compliance. The suggestion that a physician who violated the requirements of the bill somehow would be subject to prosecution for criminal homicide for performing an unlawful abortion has no valid basis in law. Under this reasoning, a health care provider who violated the existing informed consent requirements also might potentially be subject to a criminal homicide prosecution, yet no one has ever seriously raised this possibility.

Sonograms and fetal heart detection procedures are very commonly used diagnostic tools used at various stages of pregnancy. They have been proven safe and effective and would in no way damage the health of either the pregnant woman or the unborn child.

While some argue that the bill possibly could infringe on the First Amendment rights of the patient and the physician, a woman would be free to leave at any time she chose, so arguments that the woman would be a captive audience would not apply. On issues of a physician's First Amendment rights, deference is given to the health and safety of the woman.

OPPONENTS SAY:

CSHB 15 is unnecessary because informed consent already is required for all surgical procedures, including abortion. This bill is based on the erroneous assumption that women are making uninformed choices about as profound a medical decision as having an abortion. Most women

already have obstetric sonograms before abortions and have the opportunity to view the sonogram images. But such a procedure should be based on medical need, not a state-imposed mandate rigidly imposed in all but the most life-threatening situations and intended to discourage women from exercising their constitutionally protected right.

Requiring a woman to have a sonogram and listen to fetal heartbeat before an abortion would emotionalize a woman's decision inappropriately. Electing to end a pregnancy is a difficult choice. When a woman has made her decision, the effect of this bill would not be to help her make an informed choice but to shame her for that choice. This bill would be especially traumatic for victims of sexual assault or incest or women seeking abortion due to a severe fetal abnormality. Women in these already painful situations would not be exempt from the bill's requirements.

The bill would needlessly infringe on a woman's relationship with her doctor. The doctor, in consultation with the patient, should determine whether a woman should have a sonogram before an abortion, not the state. Although a sonogram often is performed before an abortion and always is performed before an abortion at Planned Parenthood facilities, it is unnecessary in some cases. The bill could result in unnecessary or repeat sonograms.

CSHB 15 makes no clear provision for a woman to opt out of seeing the sonogram images, hearing the fetal heart tones, and receiving a verbal description of each of these. The bill only states that the woman would not be "subject to a penalty" if she chose not to receive the explicit information the bill would mandate about the fetus, yet she would have to certify by her signature and initials that she had received this information or else the procedure could not be performed.

Requiring a woman to submit to a potentially unwanted sonogram in order to receive another medical procedure would create an undue burden on the woman's exercise of a liberty that the U.S. Supreme Court consistently has affirmed over nearly four decades as being constitutionally protected. In addition, the waiting period of at least 24 hours and no more than 72 hours would burden women traveling to receive the procedure, especially from rural areas. The woman could endure added financial expense and needless emotional distress when she already had made her decision.

The penalty for physicians violating the bill would be too harsh. They automatically would lose their license, not for malpractice but merely for violating paperwork procedures. The state needs to retain Texas doctors, especially those in medically underserved areas, yet this bill automatically would revoke a doctor's license for not having a form on file.

The potential penalty could be even harsher depending on how the bill was interpreted. Under Penal Code, sec. 19.06, the criminal homicide laws do not apply to the death of an unborn child if the death was the result of a lawful medical procedure performed by a licensed health care provider with the requisite consent. Failing to abide by the requirements of CSHB 15 could mean that the procedure could be considered unlawful, potentially subjecting the provider to felony prosecution.

Health care providers should have the discretion to forego the requirement of the bill if medically indicated. Questions have been raised about the possible impact on early fetal development from the effects of ultrasounds, yet this bill would require a sonogram in almost every case.

The language regarding whether a woman could refuse to receive information is vague and unclear. It could violate the free speech rights of patients and physicians by making the patient a compelled listener and the doctor a compelled speaker, which is prohibited under the First Amendment. Under the captive audience doctrine, the listener cannot be forced to listen to speech in a private setting. Physicians would become compelled speakers with the threat of losing their license if they did not make the verbal explanations required by the bill.

NOTES:

A similar bill, SB 16 by Patrick, passed the Senate on February 17 by 21-10 (Davis, Ellis, Gallegos, Hinojosa, Rodriquez, Van de Putte, Watson, Wentworth, West, Whitmire). It was received in the House on February 21 and has not been referred to committee.

Comparison of SB 16 to CSHB 15:

SB 16 would amend the existing law requiring informed consent before an abortion to require a sonogram and fetal heart auscultation accompanied by verbal descriptions of the images and sounds. CSHB 15 would not amend the current informed consent law, but instead would create a new, separate

subchapter requiring a sonogram, heart auscultation, and accompanying verbal descriptions.

SB 16 would allow the pregnant woman to choose not to view the sonogram or hear the heart auscultation. She could choose not to receive the verbal explanation of the results of the sonogram images if the woman's pregnancy were a result of a sexual assault or incest, if the woman were a minor and obtaining an abortion in accordance with judicial bypass procedures, or if the fetus had an irreversible medical condition or abnormality that had been previously identified by reliable diagnostic procedures and documented in the woman's medical file. It would allow an exception from the requirements for a medical emergency, defined as a condition that complicated the medical condition of the pregnant woman and necessitated the immediate abortion of her pregnancy to avert her death or to avoid a serious risk of substantial impairment of a major bodily function.

CSHB 15 does not specify the circumstances when a women could choose not to view the sonogram or fetal heart auscultation. It would define a medical emergency allowing a waiver of its requirements as a life-threatening physical condition caused by or arising from the pregnancy itself that placed the woman in danger of death or serious risk of substantial impairment of a major bodily function unless an abortion were performed.

SB 16 would require that a physician perform a sonogram, heart auscultation, and accompanying verbal descriptions no less than two hours before an abortion process began. CSHB 15 would require that a physician perform a sonogram, heart auscultation, and accompanying verbal descriptions no more than 72 hours and no less than 24 hours before an abortion procedure began.

Physicians who violated SB 16 would be subject to the penalties prescribed in the current informed consent law, which is a misdemeanor fine not to exceed $10,000. Physicians who violated CSHB 15 would have their licenses revoked.

Comparison of original version of HB 15 to committee substitute:

The committee substitute for HB 15 eliminated a provision in the original version of the bill that would have authorized civil action for actual and punitive damages to be brought against a physician, a physician's agent, an abortion provider, or an abortion provider's agent who knowingly or recklessly violated the bill's provisions.

The substitute revised the definition of "medical emergency" in the original bill to include a serious risk to the woman of substantial impairment of a major bodily function unless an abortion was performed.

The substitute added the severability provision, which was not in the original bill.

The substitute would specify that the copy of a pregnant woman's signed certification form would have to be placed in the pregnant woman's medical records rather than placed in the woman's medical file, as in the original.

The substitute would require a physician to retain a copy of the signed certification of a woman who was a minor until the later of seven years or the woman's 21st birthday, rather than her 23rd birthday, as in the original bill.

Committee action:

During House floor consideration of CSHB 15 on March 2, the bill was recommitted to the State Affairs Committee, which reported the bill favorably, as substituted, with no change from its earlier version.

Before considering HB 15 and a related bill, HB 201 by Morrison, et al., at a public hearing on February 23, the State Affairs Committee took general testimony on issues relating to sonograms and informed consent before an abortion, and the following witnesses testified:

For — Jennifer Allmon, Texas Catholic Conference and Roman Catholic Bishops of Texas; Jason Collins, Reid Collins & Tsai LLP; Linda Flower, Texas Physicians Resource Council; Elizabeth Graham, Mary Maxian, Texas Right to Life; Ann Hettinger, Concerned Women for America; Margaret Hotze, Foundation For Life, Houston, TX; Texas Right to Life; Juda Myers, Choices4Life; Myra Myers, Operation Outcry; Joe Pojman,

Texas Alliance for Life, Inc; Jonathan Saenz, Liberty Institute; Cynthia Sisto Wenz, The Source (Pregnancy Medical Center); Terry Williams, Central Texas Life Care/Care Net; Kyleen Wright, Texans for Life Committee; and 12 others representing themselves; (*Registered, but did not testify:* Cathie Adams; Wayman Chunn, Life Advocates-Houston, TX; Christopher Donatto, John Seago, Emily Horne, Emily Kebodeaux, Texas Right to Life; Dina Meyer, Texas Alliance for Life; and 13 others representing themselves)

Against — Terri Burke, ACLU of Texas; Elisa Saslavsky, National Council of Jewish Women; George Haslan; (*Registered, but did not testify:* Victoria Camp, Texas Association Against Sexual Assault; Sara Cleveland, NARAL Pro-Choice Texas; Sandra Haverlah, Planned Parenthood of North Texas; Susan Reid, League of Women Voters of Texas; Joy Celeste Sheppard, Texas Association of Obstetricians and Gynecologists (TAOG), Society for Maternal-Fetal Medicine (SMFM), and American Congress of Obstetricians and Gynecologists (ACOG); Scott Spear, Planned Parenthood of the Texas Capital Region; Mini Timmaratu, for Peter J. Durkin , CEO, Planned Parenthood Gulf Coast; Eugene Toy, Texas Association of Ob Gyn.; Kailey Voellinger, for Joshua Pearson (Partner); Lindsey Black; Aimee Boone)

On — MerryLynn Gerstenschlager, Texas Eagle Forum; Russell Crawford; (*Registered, but did not testify:* Pat Carlson, Texas Eagle Forum)