

New Texas Abortion Statute

written by Guest Author | September 10, 2021

On September 1st, 2021 Texas Senate Bill No. 8, known as the Texas Heartbeat Act, became law. Its intention was to severely limit a woman's constitutional right to an abortion. The statute precludes a physician from performing or inducing an abortion on a pregnant woman until the physician has determined whether the woman's unborn child has a detectable fetal heartbeat. It further states that "a physician may not knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child." The law allows an exception for medical emergencies and provides that the law shall be exclusively enforced by private civil actions that can be brought by any person but prohibits all enforcement action by the state or a political subdivision, a district or county attorney, or an executive or administrative office or employee of Texas or a political subdivision. The person who brings the civil action can be awarded injunctive relief and statutory damages of not less than \$10,000.00 for each abortion performed or induced in violation of this law.

The civil action can be brought against any person who performs or induces an abortion in violation of this law (when the abortion occurs after a fetal heartbeat has been detected or if a determination of a fetal heartbeat was not made) or any person who knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying or reimbursing the costs of an abortion through insurance or otherwise if the abortion violates the law.

It is this language, "**any person who knowingly engages in conduct that aids or abets the performance or inducement of an abortion...**" that has mental health professionals in Texas concerned. Providers work with women in a variety of contexts in which the decision to terminate a pregnancy is an issue they want to address. Many providers are wondering if they can be sued under this statute if they assist a client in processing this decision if the client goes forward with an abortion that violates the law.

The answer is maybe. The language is vague. Until we have judicial decisions on how this provision should be interpreted and applied there will be uncertainty. What I know to be fact is that mental health providers have always helped clients process difficult life decisions. It is also fact the ethical codes make clear a client's right to autonomy. What I recommend is for providers to treat the decision to terminate a pregnancy like they would any other major life decision. Provide clients with support as they work through the decision but do not encourage, advocate for or direct an outcome. The Texas Counseling Association has recommended having the client work through a decision-making model allowing them to determine for themselves their best course of action. I think that is an excellent approach and advise careful documentation in the client's record of each step the client works through and their decision. There are numerous models and a common one that is easy to apply is the rational decision making model.

When a client first makes known they want the provider's assistance with a decision to terminate a pregnancy I recommend that the client be informed that the provider will not recommend, encourage or dissuade the client with respect to terminating a pregnancy and that the client will ultimately make the decision of their own accord. This should be documented in the client record. If the client asks for an opinion about the law itself I advise directing the client to seek legal consultation and to refrain from offering an opinion and to document this in the client's record.

This law has several other aspects and provisions that are troubling to a large number of people such as the lack of exceptions for rape and incest or fetal anomalies. A provision that may prove helpful in defending a civil action against a therapist under this statute reads as follows: "This section may not be construed to impose liability on any speech or conduct protected by the First Amendment of the United States Constitution, as made applicable to the states through the United States Supreme Court's interpretation of the Fourteenth Amendment of the United States Constitution, or by Section 8, Article I, Texas Constitution. I think we all would agree that everyone has the right to speak about health matters with their health care professionals.

Legal challenges to the Texas Heartbeat Act have begun. The U.S. Department of Justice has filed suit against the state of Texas in federal court asking the court to declare the law invalid and "to enjoin its enforcement and to protect the rights Texas has violated."

Stay tuned.

Written by Tom Hartsell, Attorney at Law