

Massachusetts

“It is established that “[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy. . . . This is understandable, for in a field that by definition concerns the most intimate of human activities and relationships, decisions whether to accomplish or to prevent conception are among the most private and sensitive.” *Moe v. Sec’y of Admin. & Fin.*, 417 N.E.2d 387, 399 (1981) (citations omitted)

Mass. Ann. Laws ch. 112 § 12J. Experimentation on Human Fetuses Prohibited.

(a) I. No person shall use any live human fetus whether before or after expulsion from its mother’s womb, for scientific, laboratory, research or other experimentation. This section shall not prohibit procedures incident to the study of a human fetus while it is in its mother’s womb or a neonate; provided that in the best medical judgment of the physician, made at the time of the study, the procedures do not substantially jeopardize the life or health of the fetus or neonate; and provided further that, in the case of a fetus, the fetus is not the subject of a planned abortion. In any criminal proceeding, a fetus shall be conclusively presumed not to be the subject of a planned abortion if the mother signed a written statement at the time of the study, that she was not planning an abortion.

This section shall not prohibit or regulate diagnostic or remedial procedures the purpose of which is: (i) to determine the life or health of the fetus or neonate involved; (ii) to preserve the life or health of the fetus or neonate involved or the mother involved; (iii) to improve the chances of a viable birth for a fetus with a congenital or other fetal conditions that would otherwise substantially impair or jeopardize the fetus’s health or viability; or (iv) research approved by an institutional review board applying federal regulations for the protection of fetuses and neonates, that are conducted for the purpose of developing, comparing or improving diagnostic or therapeutic fetal or neonatal interventions to improve the viability or quality of life of fetuses, neonates and children.

For the purposes of this section, “fetus” shall also include an embryo, but shall exclude a pre-implantation embryo or parthenote as defined in section 2 of chapter 111L and obtained in accordance with said chapter 111L.

A fetus is a live fetus for purposes of this section when, in the best medical judgment of a physician, it shows evidence of life as determined by the same medical standards as are used in determining evidence of life in a spontaneously-aborted fetus at approximately the same stage of gestational development.

For purposes of this section, “institutional review board” shall mean a board that has a minimum of 5 members who meet regularly to review research applying the standards of 45 CFR Part 46 or 21 CFR Parts 50 and 56, as may be amended from time to time.

(a) II. No experimentation shall knowingly be performed upon a dead fetus or dead neonate unless the consent of the parent or guardian has first been obtained; provided, however, that such consent shall not be required for a routine pathological study. In any criminal proceeding, consent shall be conclusively presumed to have been granted for the purposes of this section by a written statement, signed by the parent or guardian who is at least 18 years of age, to the effect that the parent or guardian consents to the use of the dead fetus or dead neonate for scientific, laboratory, research or other experimentation or study. Such written consent shall constitute authorization for the transfer of the dead fetus or dead neonate.

(a) III. No person shall perform or offer to perform an abortion where part or all of the consideration for said performance is that the fetal remains may be used for experimentation or other kind of research or study.

(a) IV. No person shall knowingly sell, transfer, distribute or give away any fetus or neonate for a use which is in violation of this section.

(a) V. Except as hereafter provided, whoever violates the provisions of this section shall be punished by imprisonment in a jail or house of correction for not less than one year nor more than two and one-half years or by imprisonment in the state prison for not more than five years and by the imposition of a fine of up to ten thousand dollars.

(a) VI. In any criminal action under this subsection (a), it shall be a complete defense that at the time of its performance the subject procedure had received the written approval of a duly appointed Institutional Review Board provided that such Board sets forth in its written approval that the procedure does not violate the provisions of this subsection (a) and sets forth therein a reasonable basis for such conclusion and provided that there was not outstanding, at any time that the subject procedure was being performed, a judgment of a court entered pursuant to the provisions of subsection (b), that the subject procedure violates the provisions of this subsection (a). The written approval shall contain a detailed description of the procedure by attachment of a protocol or other writing or otherwise and shall be maintained as a permanent record by such Board or by the hospital or other institution for which the Board acts.

A copy of the written approval, together with any attached protocol or other writing, shall be filed with the office of the attorney general. Such copy shall be available for public inspection at reasonable times. No member of an Institutional Review Board voting not to approve a procedure, or not present at such a vote, shall be criminally or civilly liable for such approval by the Institutional Review Board or for the performance of the procedure by others. No member of such a Board voting to approve a procedure shall be criminally or civilly liable for such approval by him or the performance of the procedure by others if, based on the written approval and the

basis thereof referred to above, such a member acts on a good faith belief that the procedure does not violate the provisions of this section.

(a) VII. Where there is outstanding such a judgment that the subject procedure violates the provisions of this subsection (a), it shall not constitute a defense that the person performing said procedure did not receive notice, or otherwise know, of that judgment; provided, however, that until the attorney general files a copy of the judgment prohibiting a procedure with the Commissioner of Public Health as provided in subsection (b) VII it shall constitute a defense that the person performing the subject procedure did not have notice of the judgment and that he had obtained the approval of the Institutional Review Board for the subject procedure as provided in subsection (a) VI.

(b) I. Whenever a procedure has been approved by a duly appointed Institutional Review Board which the attorney general has reasonable grounds to believe is prohibited under the provisions of subsection (a), he shall file a complaint in the Superior Court sitting in a county where the procedure is performed seeking a determination of whether said procedure violates the provisions of this statute. The complaint shall describe the procedure and the reason or reasons why there are reasonable grounds to believe that the said procedure is in violation of the provisions of this statute. The complaint shall name as defendants those persons within his jurisdiction whom the attorney general reasonably believes have performed, are performing, or are about to perform, the described procedure and those institutions within his jurisdiction in which said procedure has been performed, is being performed, or is about to be performed; such defendants shall be served with a copy of the complaint and a summons in accordance with the provisions of Rule 4 of the Massachusetts Rules of Civil Procedure. Upon the filing of the complaint, notice thereof shall be given by the attorney general, by certified or registered mail, to the Commissioner of Public Health, who in turn shall give the same notice to those institutions in the Commonwealth who, in the judgment of said Commissioner, may be affected by a judgment in the action, and in any event to all of the licensed medical schools in the Commonwealth.

(b) II. Any person or institution which has performed, is performing, or is about to perform, a procedure, may file a complaint in the Superior Court seeking a determination of whether said procedure violates the provision of this statute. Said determination may be sought irrespective of whether said procedure has been approved by an institutional review board. The complaint, which shall have attached thereto a copy of any protocol relative to said procedure, shall describe the procedure and state the reason or reasons which cause the plaintiff to seek the judicial determination. The complaint shall name the attorney general as defendant in the action and he shall be served with a copy of the complaint, including the attached protocol, if any, and the summons in accordance with the provisions of Rule 4 of the Massachusetts Rules of Civil Procedure. Service shall be made by delivery to the office of said attorney general; or by mailing by certified or registered mail to said office. Upon receipt of service, notice shall be given by the attorney general, by certified or registered mail, to the Commissioner of Public Health who in turn shall give notice to those institutions who in the judgment of said commissioner may be

affected by a judgment in the action, and in any event to all of the licensed medical schools in the Commonwealth.

(b) III. Any person or institution desiring to intervene in the action may file a motion to intervene with the court in which the action is pending within ten days from the mailing of such notice, except that the court, for good cause shown, may allow said motion after the ten-day period. A copy of the motion to intervene shall also be served upon the attorney general and upon the persons or institutions initiating the action or against whom the action has been initiated. The motion shall be signed and certified under oath by the applicant and shall state the grounds therefore showing that the applicant claims an interest in the issue of the lawfulness of the subject procedure in that he has performed said procedure, or that he is performing said procedure, or that he is about to perform said procedure, and that the disposition of the action may impair or impede his ability to perform or continue to perform said procedure. Upon a determination by the court that the applicant has satisfied the requirement of this section, the court shall allow the applicant to intervene in the action.

(b) IV. After service of the complaint upon an original party, such party shall serve and file an answer within twenty days unless otherwise directed by order of the court. The answer shall state whether, in the opinion of the pleader, the subject procedure is prohibited by the provisions of this statute and the reason or reasons for such opinion. An intervenor may serve and file a pleading in support of either the complaint or answer within ten days from receipt of notice of the granting of the motion to intervene. Unless the court otherwise orders, no response to the pleading of an intervenor is required.

(b) V. Any party may move for summary judgment, in accordance with Rule 56 of the Massachusetts Rules of Civil Procedure, or for judgment on the pleadings in accordance with Rule 12(c) of the Massachusetts Rules of Civil Procedure. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion.

(b) VI. Any trial on the merits shall be without a jury. The court shall find the facts specially and shall set forth in writing separately its findings of facts and conclusions of law thereon and shall enter judgment accordingly. Such judgment may be appealed to the Supreme Judicial Court. Until reversed, however, by the Supreme Judicial Court, such judgment shall constitute an in rem judgment, binding within the Commonwealth of Massachusetts, that the subject procedure is prohibited or is not prohibited by the provisions of this statute.

(b) VII. Upon the entry of a judgment that a procedure is prohibited by the provisions of this statute, the attorney general shall promptly give notice by publication in a newspaper of general circulation in each of the counties of the Commonwealth and by sending notification by registered or certified mail to each licensed hospital and medical school in the Commonwealth; such notice shall contain a description of the prohibited medical procedure and shall state that the

performance of such procedure constitutes a crime punishable under the provisions of this statute. A copy of all judgments and accompanying opinions permitting or prohibiting a procedure shall be filed by the attorney general with the Commissioner of Public Health. The Commissioner of Public Health shall maintain a permanent file of such judgments and opinions for public inspection.

(b) VIII. Any action brought under this statute to determine whether a procedure is prohibited by the provisions of this statute and any appeal of a judgment that a procedure is or is not prohibited by the provisions of this statute shall be advanced for a prompt and speedy disposition consistent, however, with a reasonable opportunity being afforded to the parties to properly prepare the case.

(b) IX. If any section, subsection, paragraph, sentence or clause of this statute is held to be unconstitutional, such holding shall not affect the remaining portions of this statute.

(b) X. Upon receipt of a request from an institution conducting, or preparing to conduct, research pursuant to this section, the attorney general shall provide a written advisory opinion concerning whether such research is regulated, prohibited, authorized by this chapter by or whether it is exempt from this chapter. If in the opinion of the attorney general the research described in the request exempt from, or authorized by this chapter, the opinion shall constitute an affirmative defense to any criminal prosecution brought pursuant to this section. Opinions issued by the attorney general pursuant to this section shall be maintained in a publicly accessible manner by the attorney general and shall be filed with the commissioner of public health.

Mass. Ann. Laws ch. 112 § 12L. Abortion — Personal Decision.

The commonwealth, or a subdivision thereof, shall not interfere with a person's personal decision and ability to prevent, commence, terminate or continue their own pregnancy consistent with this chapter, or restrict the use of medically appropriate methods of abortion or the manner in which medically appropriate abortion is provided.

Mass. Ann. Laws ch. 112 § 12M. Abortion — Pregnancy of Less Than 24 Weeks.

A physician, physician assistant, nurse practitioner or nurse midwife may perform an abortion consistent with the scope of their practice and license if, in their best medical judgment, the pregnancy has existed for less than 24 weeks.

Mass. Ann. Laws ch. 112 § 12N. Abortion — Pregnancy of 24 Weeks or More.

If a pregnancy has existed for 24 weeks or more, no abortion may be performed except by a physician, and only if in the best medical judgment of the physician it is: (i) necessary to preserve the life of the patient; (ii) necessary to preserve the patient's physical or mental health; (iii) warranted because of a lethal fetal anomaly or diagnosis; or (iv) warranted because of a

grave fetal diagnosis that indicates that the fetus is incompatible with sustained life outside of the uterus without extraordinary medical interventions.

Mass. Ann. Laws ch. 112 § 12N½. Abortion — Independent Consideration Required Under § 12N; Annual Report.

(a) Each circumstance permitting an abortion for a pregnancy that has existed for 24 weeks or more under section 12N shall be considered independently by a treating physician and a patient or the patient's health care proxy. No medical review process shall override a determination by a treating physician and a patient or the patient's health care proxy to provide an abortion consistent with said section 12N.

(b) Annually, not later than September 1, every facility authorized to perform health care services under section 12N shall submit to the department of public health a written report that includes the facility's procedures and processes for providing services consistent with said section 12N and this section.

Mass. Ann. Laws ch. 112 § 12O. Abortion — Life-Supporting Equipment.

If an abortion is performed pursuant to section 12N, the facility where the abortion is performed shall maintain life-supporting equipment, as defined by the department of public health, to enable the physician performing the abortion to take appropriate steps, in keeping with good medical practice and consistent with the procedure being used, to preserve the life and health of a live birth and the patient.

Mass. Ann. Laws ch. 112 § 12P. Abortion — Informed Consent; Hospital.

Except in an emergency requiring immediate action, an abortion shall not be performed under section 12M or section 12N unless the written informed consent of the proper person has been obtained as set forth in section 12R.

Except in an emergency requiring immediate action, an abortion shall not be performed under section 12N unless performed in a hospital duly authorized to provide facilities for obstetrical services.

Mass. Ann. Laws ch. 112 § 12Q. Abortion — Collection of Data; Report.

The commissioner of public health shall collect aggregate data on abortions performed by a physician, physician assistant, certified nurse practitioner or certified nurse midwife on a form promulgated by the commissioner that shall include, but not be limited to, the: (i) date and place of the abortions performed; (ii) ages of the pregnant patients; (iii) method used to perform the abortions; and (iv) gestational age when the abortions were performed. The commissioner shall prepare from these forms such statistical tables with respect to maternal health, abortion procedures and gestational age as the commissioner deems useful and shall make an annual

report thereof to the general court. Nothing in this section shall limit the authority of the department of public health to require reports pursuant to sections 24A and 25A of chapter 111.

Mass. Ann. Laws ch. 112 § 12R. Abortion — Informed Consent; Confidentiality; Patients Under Age 16.

An abortion shall not be performed without first obtaining the written informed consent of the patient seeking an abortion. The commissioner of public health shall prescribe a form to use in obtaining such consent. A patient seeking an abortion shall sign the consent form in advance of the time for which the abortion is scheduled, except in an emergency requiring immediate action; provided, however, that this requirement shall not impose any waiting period between the signing of the consent form and the patient obtaining the abortion. The patient shall then return it to the physician, physician assistant, nurse practitioner or nurse midwife performing the abortion who shall maintain it in their files and who shall destroy it 7 years after the date upon which the abortion is performed.

The consent form and any other forms, transcript of evidence or written findings or conclusions of a court shall be confidential and shall not be released to any other person except by the patient's written informed consent or by a proper judicial order, other than to the patient themselves, to whom such documents relate, the physician, physician assistant, nurse practitioner or nurse midwife who performed the abortion or any person whose consent is obtained pursuant to this section or under any other applicable state or federal law. If a patient is less than 16 years of age and has not married, an abortion shall not be performed unless the physician, physician assistant, nurse practitioner or nurse midwife first obtains both the consent of the patient and that of 1 of the patient's parents or guardians, except as hereinafter provided. In deciding whether to grant such consent, a patient's parent or guardian shall consider only the patient's best interests. If a patient less than 16 years of age has not married and if the patient is unable to obtain the consent of 1 of their parents or 1 of their guardians to the performance of an abortion, or if they elect not to seek the consent of a parent or a guardian, or in the case of incest, a judge of the superior court department of the trial court of the commonwealth shall, upon petition or motion, and after an appropriate hearing held in person or via teleconference at the patient's option, authorize a physician, physician assistant, nurse practitioner or nurse midwife to perform the abortion if the judge determines that the patient is mature and capable of giving informed consent to the procedure or, if the judge determines that the patient is not mature, that performance of an abortion would be in the patient's best interests. A patient less than 16 years of age may participate in proceedings in the superior court department of the trial court on their own behalf and the court may appoint a guardian ad litem for the patient. The court shall, however, advise the patient that they have a right to court appointed counsel and shall, upon the patient's request, provide the patient with such appointed counsel. Proceedings in the superior court department of the trial court under this section shall be confidential and shall be given such precedence over other pending matters that the court may reach a decision promptly and without delay so as to serve the best interests of the patient. The chief justice of the superior court department of the trial court shall establish procedures for conducting proceedings under this

section promptly and without delay including, but not limited to, procedures to accommodate the patient outside of normal court hours. A judge of the superior court department of the trial court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting their decision and shall order a record of the evidence to be maintained including the findings and conclusions. Exclusive jurisdiction over appeals of a denial by the superior court of authorization for a patient to obtain an abortion is hereby conferred on the supreme judicial court or a single justice thereof. Notwithstanding section 12F, a patient may provide consent and consent shall be granted under subparagraphs (ii) to (vi), inclusive, of said section 12F for abortion if the minor is not less than 16 years of age.