

ENGROSSED

H. B. 4588

(By Delegates Perry, Reynolds, Skaff, P. Smith,
Pino, Moye, Eldridge, Campbell, Stephens, Marcum
and Barker)

[Introduced February 14, 2014; referred to the
Committee on Health and Human Resources then the Judiciary.]



A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article, designated §16-2M-1, §16-2M-2, §16-2M-3, §16-2M-4, §16-2M-5, §16-2M-6, §16-2M-7, §16-2M-8, and §16-2M-9, all relating to abortions generally and protecting unborn children who are capable of experiencing pain by prohibiting abortion after twenty weeks post-fertilization except when the mother has a medical emergency; providing for civil remedies; creating misdemeanors and felonies; stating legislative findings; and providing definitions.

Be it enacted by the Legislature of West Virginia:

That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new article, designated §16-2M-1, §16-2M-2, §16-2M-3, §16-2M-4, §16-2M-5, §16-2M-6, §16-2M-7, §16-2M-8 and §16-2M-9, all to read as follows:

ARTICLE 2M. THE PAIN-CAPABLE UNBORN CHILD PROTECTION ACT.

§16-2M-1. Legislative findings.

The Legislature makes the following findings:

(1) Pain receptors (unborn child's entire body nociceptors) are present no later than sixteen weeks after fertilization and nerves link these receptors to the brain's thalamus and subcortical plate by no later than twenty weeks.

(2) By eight weeks after fertilization, the unborn child reacts to stimuli that would be recognized as painful if applied to an adult human, for example, by recoiling.

(3) In the unborn child, application of painful stimuli is associated with significant increases in stress hormones known as the stress response.

(4) Subjection to painful stimuli is associated with long- term harmful neuro developmental effects, such as altered pain sensitivity and, possibly, emotional, behavioral and learning disabilities later in life.

(5) For the purposes of surgery on unborn children, fetal anesthesia is routinely administered and is associated with a decrease in stress hormones compared to their level when painful stimuli is applied without the anesthesia.

(6) The position, asserted by some medical experts, that the unborn child is incapable of experiencing pain until a point later in pregnancy than twenty weeks after fertilization predominately rests on the assumption that the ability to experience pain depends on the cerebral cortex and requires nerve connections between the thalamus and the cortex. However, recent medical research and analysis, especially since 2007, provides strong evidence for the conclusion that a functioning cortex is not necessary to experience pain.

(7) Substantial evidence indicates that children born missing the bulk of the cerebral

cortex, those with hydranencephaly, nevertheless experience pain.

(8) In adults, stimulation or ablation of the cerebral cortex does not alter pain perception while stimulation or ablation of the thalamus does.

(9) Substantial evidence indicates that structures used for pain processing in early development differ from those of adults, using different neural elements available at specific times during development, such as the subcortical plate, to fulfill the role of pain processing.

(10) Consequently, there is substantial medical evidence that an unborn child is capable of experiencing pain by twenty weeks after fertilization.

(11) It is the purpose of the state to assert a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain.

§16-2M-2. Definitions.

For purposes of this article, the following words have the following meanings:

"Attempt to perform or induce an abortion" means an act or an omission of a statutorily required act that, under the circumstances as the actor believes them to be, constitutes a substantial step in a course of conduct planned to culminate in the performance or induction of an abortion in this state in violation of the applicable provisions of this code.

"Fertilization" means the fusion of a human spermatozoon with a human ovum.

"Medical emergency" means a condition that, in reasonable medical judgment, so complicates the medical condition of a pregnant woman that it necessitates the immediate abortion of her pregnancy without first determining post-fertilization age to avert her death or for

which the delay necessary to determine post-fertilization age will create serious risk of substantial and irreversible physical impairment of a major bodily function. No condition may be considered a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function.

"Physician" means a person with an unlimited license to practice medicine or osteopathic medicine under the provisions of article three or fourteen, chapter thirty of this code.

"Post fertilization age" means the age of the unborn child as calculated from the fertilization of the human ovum.

"Probable post fertilization age of the unborn child" means, in reasonable medical judgment and with reasonable probability, the post fertilization age of the unborn child at the time an abortion is planned to be performed.

"Reasonable medical judgment" means a medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.

"Unborn child" or "fetus" each mean an individual organism of the species homo sapiens from fertilization until live birth.

"Woman" means a female human being whether or not she has reached the age of majority.

§16-2M-3. Determination of post fertilization age.

(a) Except in the case of a medical emergency, no abortion may be performed or induced

or be attempted to be performed or induced unless the physician performing or inducing it has first made a determination of the probable post fertilization age of the unborn child or relied upon such a determination made by another physician. In making this determination, the physician shall make such inquiries of the woman and perform or cause to be performed medical examinations and tests as a reasonably prudent physician, knowledgeable about the case and the medical conditions involved, would consider necessary to perform in making an accurate diagnosis with respect to post fertilization age.

(b) Failure by any physician to conform to any requirement of this section constitutes “professional incompetence” pursuant to section fourteen, article three, chapter thirty of this code.

§16-2M-4. Abortion of unborn child of twenty or more weeks post fertilization age prohibited.

(a) No person may perform or induce, or attempt to perform or induce, an abortion upon a woman when it has been determined, by the physician performing or inducing or attempting to perform or induce the abortion or by another physician upon whose determination that physician relies, that the probable post fertilization age of the woman’s unborn child is twenty or more weeks unless there is reasonable medical judgment that she has a condition which so complicates her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. No greater risk may be determined to exist if it is based on a claim or diagnosis that the woman will engage in conduct which she intends to

result in her death or in substantial and irreversible physical impairment of a major bodily function.

(b) When an abortion upon a woman whose unborn child has been determined to have a probable post fertilization age of twenty or more weeks is not prohibited by subsection (a) of this section, the physician shall terminate the pregnancy in the manner which, in reasonable medical judgment, provides the best opportunity for the unborn child to survive, unless, in reasonable medical judgment, termination of the pregnancy in that manner would pose a greater risk either of the death of the pregnant woman or of the substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions, of the woman than would other available methods. No greater risk may be determined to exist if it is based on a claim or diagnosis that the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

§16-2M-5. Reporting.

(a) Any physician who performs or induces or attempts to perform or induce an abortion shall report to the Division of Health, on a schedule and in accordance with forms and rules adopted and promulgated by the Department of Health and Human Resources, that include:

(1) Post fertilization age:

(A) If a determination of probable post fertilization age was made, whether ultrasound was employed in making the determination, and the week of probable post fertilization age determined.

(B) If a determination of probable post fertilization age was not made, the basis of the

determination that a medical emergency existed.

(2) Method of abortion:

(A) Medication abortion such as, but not limited to, mifepristone/misoprostol or methotrexate/misoprostol;

(B) Manual vacuum aspiration;

(C) Electrical vacuum aspiration;

(D) Dilation and evacuation;

(E) Combined induction abortion and dilation and evacuation;

(F) Induction abortion with prostaglandins;

(G) Induction abortion with intra-amniotic instillation such as, but not limited to, saline or urea;

(H) Induction abortion;

(I) Intact dilation and extraction (partial-birth); or

(J) Method not listed (specify).

(3) Whether an intra-fetal injection was used in an attempt to induce fetal demise such as, but not limited to, intrafetal potassium chloride or digoxin;

(4) Age and race of the patient;

(5) If the probable post fertilization age was determined to be twenty or more weeks, the basis of the determination that the pregnant woman had a condition which so complicated her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not

including psychological or emotional conditions;

(6) If the probable post fertilization age was determined to be twenty or more weeks, whether the method of abortion used was one that, in reasonable medical judgment, provided the best opportunity for the unborn child to survive and, if such a method was not used, the basis of the determination that termination of the pregnancy in that manner would pose a greater risk either of the death of the pregnant woman or of the substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions, of the woman than would other available methods.

(b) Reports required by subsection (a) of this section may not contain the name or the address of the patient whose pregnancy was terminated nor may the report contain any information identifying the patient, except that each report shall contain a unique medical record identifying number to enable matching the report to the patient's medical records. These reports shall be maintained in strict confidence by the department, may not be available for public inspection, and may not be made available except:

(1) To a prosecuting attorney with appropriate jurisdiction pursuant to a criminal investigation;

(2) To a prosecuting attorney pursuant to a civil investigation of the grounds for an action under subsection (b), section seven of this article; or

(3) Pursuant to court order in an action under section seven of this article.

(c) By June 30 of each year the Department of Health and Human Resources shall issue a public report providing statistics for the previous calendar year compiled from all of the reports

covering that year submitted in accordance with this section for each of the items listed in subsection (a) of this section. Each report shall provide the statistics for all previous calendar years during which this section was in effect, adjusted to reflect any additional information from late or corrected reports. The Department of Health and Human Resources shall take care to ensure that none of the information included in the public reports could reasonably lead to the identification of any pregnant woman upon whom an abortion was performed, induced or tempted.

(d) Any physician who fails to submit a report by the end of thirty days following the due date is subject to a late fee of \$1,000 for each additional thirty day period or portion of a thirty day period the report is overdue. Any physician required to report in accordance with this article who has not submitted a report or has submitted only an incomplete report more than six months following the due date, may, in an action brought by the department, be directed by a court of competent jurisdiction to submit a complete report within a period stated by court order or be subject to civil contempt. Intentional or reckless failure by a physician to conform to any requirement of this section, other than late filing of a report, constitutes "professional incompetence" pursuant to section fourteen, article three, chapter thirty of this code. Intentional or reckless failure by a physician to submit a complete report in accordance with a court order constitutes "professional incompetence" pursuant to section fourteen, article three, chapter thirty of this code. Intentional or reckless falsification of any report required under this section is a misdemeanor.

(e) Within ninety days of the effective date of this article, the Department of Health and

Human Services shall adopt and promulgate forms and regulations to assist in compliance with this section. Subsection (a) of this section shall take effect so as to require reports regarding all abortions performed or induced on and after the first day of the first calendar month following the effective date of the rules.

§16-2M-6. Criminal penalties.

Any person who intentionally or recklessly performs or induces or attempts to perform or induce an abortion in violation of this article is guilty of a felony and, upon conviction thereof, shall be fined not more than \$5,000 or imprisoned in a state correctional facility not less than one year nor more than five years, or both fined and imprisoned. No penalty may be assessed against the woman upon whom the abortion is performed or induced or attempted to be performed or induced.

§16-2M-7. Civil remedies.

(a) A woman upon whom an abortion has been performed or induced in violation of this article, or the father of the unborn child who was the subject of such an abortion, may maintain an action against the person who performed or induced the abortion in intentional or reckless violation of this article for actual and punitive damages. A woman upon whom an abortion has been attempted in violation of this article may maintain an action against the person who attempted to perform or induce the abortion in an intentional or reckless violation of this article for actual and punitive damages.

(b) A cause of action for injunctive relief against a person who has intentionally or recklessly violated this article may be maintained by the woman upon whom an abortion was

performed or induced or attempted to be performed or induced in violation of this article, by: (1) A person who is the spouse, parent, sibling or guardian of, or a current or former licensed health care provider of, the woman upon whom an abortion has been performed or induced or attempted to be performed or induced in violation of this article; (2) or by a prosecuting attorney with appropriate jurisdiction. The injunction prevents the abortion provider from performing or inducing or attempting to perform or induce further abortions in violation of this article in this state.

(c) If judgment is rendered in favor of the plaintiff in an action described in this section, the court shall also render judgment for a reasonable attorney's fee in favor of the plaintiff against the defendant.

(d) If judgment is rendered in favor of the defendant and the court finds that the plaintiff's suit was frivolous and brought in bad faith, the court shall also render judgment for a reasonable attorney's fee in favor of the defendant against the plaintiff.

(e) No damages or attorney's fee may be assessed against the woman upon whom an abortion was performed or induced or attempted to be performed or induced except in accordance with subsection (d) of this section.

§16-2M-8. Protection of privacy in court proceedings.

In every civil or criminal proceeding or action brought under this article, the court shall rule whether the anonymity of any woman upon whom an abortion has been performed or induced or attempted to be performed or induced shall be preserved from public disclosure if she does not give her consent to such disclosure. The court, upon motion or sua sponte, shall make

a ruling and, upon determining that her anonymity should be preserved, issue orders to the parties, witnesses and counsel and direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to the extent necessary to safeguard her identity from public disclosure. Each order shall be accompanied by specific written findings explaining why the anonymity of the woman should be preserved from public disclosure, why the order is essential to that end, how the order is narrowly tailored to serve that interest and why no reasonable less restrictive alternative exists. In the absence of written consent of the woman upon whom an abortion has been performed or induced or attempted to be performed or induced, anyone, other than a public official, who brings an action under subsection (a) or (b), section seven of this article shall do so under a pseudonym. This section does not conceal the identity of the plaintiff or of witnesses from the defendant or from attorneys for the defendant.

§16-2M-9. Construction.

This article does not repeal, by implication or otherwise, any otherwise applicable provision of West Virginia law regulating or restricting abortion. An abortion that complies with this article but violates the provisions of or any otherwise applicable provision of West Virginia law is unlawful as provided in that provision. An abortion that complies with the provisions of or any otherwise applicable provision of West Virginia law regulating or restricting abortion but violates this article is unlawful as provided in this article. If some or all of the provisions of this article are temporarily or permanently restrained or enjoined by judicial order, all other provisions of West Virginia law regulating or restricting abortion shall be enforced as though the restrained or enjoined provisions had not been adopted: *Provided*, That whenever

the temporary or permanent restraining order of injunction is stayed or dissolved or otherwise ceases to have effect, the provisions shall have full force and effect.

NOTE: The purpose of this bill is to protect unborn children who are capable of experiencing pain by prohibiting abortion after twenty weeks post-fertilization except when the mother has a medical emergency. The bill provides for civil and criminal remedies.

This article is new; therefore, it has been completely underscored.