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Senate Bill No. 589

(By Senators Kessler (Mr. President) and Prezioso)



[Introduced February 14, 2012; referred to the Committee on Health and Human Resources; and then to the Committee on 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, §16-2M-9 and §16-2M-10, all relating to abortions generally; protecting unborn children who are capable of experiencing pain by prohibiting abortion after twenty weeks postfertilization except when the mother has a medical emergency; providing for civil remedies and remedies at law; stating legislative findings; definitions; creating felony criminal penalties; and creating a special revenue fund known as the West Virginia Pain-Capable Unborn Child Protection Act Litigation Fund.

Be it enacted by the Legislature of West Virginia:

1 That the Code of West Virginia, 1931, as amended, be amended
2 by adding thereto a new article, designated §16-2M-1, §16-2M-2,
3 §16-2M3, §16-2M-4, §16-2M-5, §16-2M-6, §16-2M-7, §16-2M-8, §16-2M-9
4 and §16-2M-10, all to read as follows:

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

6 **§16-2M-1. Legislative findings.**

7 The Legislature makes the following findings:

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

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

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

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

22 (e) For the purposes of surgery on unborn children, fetal
23 anesthesia is routinely administered and is associated with a

1 decrease in stress hormones compared to their level when painful
2 stimuli is applied without the anesthesia.

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

12 (g) Substantial evidence indicates that children born missing
13 the bulk of the cerebral cortex, those with hydranencephaly,
14 nevertheless experience pain.

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

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

23 (j) Consequently, there is substantial medical evidence that

1 an unborn child is capable of experiencing pain by twenty weeks
2 after fertilization.

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

7 **§16-2M-2. Definitions.**

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

10 (a) "Attempt to perform or induce an abortion" means an act,
11 or an omission of a statutorily required act, that, under the
12 circumstances as the actor believes them to be, constitutes a
13 substantial step in a course of conduct planned to culminate in the
14 performance or induction of an abortion in this state in violation
15 of the provisions of section five, article nine, chapter sixty-two
16 of this code.

17 (b) "Fertilization" means the fusion of a human spermatozoon
18 with a human ovum.

19 (c) "Medical emergency" means a condition that, in reasonable
20 medical judgment, so complicates the medical condition of a
21 pregnant woman that it necessitates the immediate abortion of her
22 pregnancy without first determining post-fertilization age to avert
23 her death or for which the delay necessary to determine post-

1 fertilization age will create serious risk of substantial and
2 irreversible physical impairment of a major bodily function. No
3 condition may be considered a medical emergency if based on a claim
4 or diagnosis that the woman will engage in conduct which would
5 result in her death or in substantial and irreversible physical
6 impairment of a major bodily function.

7 (d) "Physician" means a person with an unlimited license to
8 practice medicine or osteopathic medicine under the provisions of
9 section one, article fourteen, chapter thirty of this code.

10 (e) "Post-fertilization age" means the age of the unborn child
11 as calculated from the fertilization of the human ovum.

12 (f) "Probable post-fertilization age of the unborn child"
13 means what, in reasonable medical judgment, will with reasonable
14 probability be the post-fertilization age of the unborn child at
15 the time an abortion is planned to be performed.

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

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

22 (i) "Woman" means a female human being whether or not she has
23 reached the age of majority.

1 **§16-2M-3. Determination of post-fertilization age.**

2 (a) Except in the case of a medical emergency, no abortion may
3 be performed or induced or be attempted to be performed or induced
4 unless the physician performing or inducing it has first made a
5 determination of the probable post-fertilization age of the unborn
6 child or relied upon such a determination made by another
7 physician. In making this determination, the physician shall make
8 such inquiries of the woman and perform or cause to be performed
9 such medical examinations and tests as a reasonably prudent
10 physician, knowledgeable about the case and the medical conditions
11 involved, would consider necessary to perform in making an accurate
12 diagnosis with respect to post-fertilization age.

13 (b) Failure by any physician to conform to any requirement of
14 this section constitutes "unprofessional conduct" pursuant to the
15 provisions of section one, article fourteen, chapter thirty of this
16 code.

17 **§16-2M-4. Abortion of unborn child of twenty or more weeks post-**
18 **fertilization age prohibited.**

19 (a) No person may perform or induce, or attempt to perform or
20 induce, an abortion upon a woman when it has been determined, by
21 the physician performing or inducing or attempting to perform or
22 induce the abortion or by another physician upon whose
23 determination that physician relies, that the probable post-

1 fertilization age of the woman's unborn child is twenty or more
2 weeks, unless there is reasonable medical judgment that she has a
3 condition which so complicates her medical condition as to
4 necessitate the abortion of her pregnancy to avert her death or to
5 avert serious risk of substantial and irreversible physical
6 impairment of a major bodily function, not including psychological
7 or emotional conditions. No such greater risk may be determined to
8 exist if it is based on a claim or diagnosis that the woman will
9 engage in conduct which she intends to result in her death or in
10 substantial and irreversible physical impairment of a major bodily
11 function.

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

1 that the woman will engage in conduct which she intends to result
2 in her death or in substantial and irreversible physical impairment
3 of a major bodily function.

4 **§16-2M-5. Reporting.**

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

10 (1) Post-fertilization age:

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

14 (B) If a determination of probable post-fertilization age was
15 not made, the basis of the determination that a medical emergency
16 existed.

17 (2) Method of abortion: Which of the following was employed:

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

20 (B) Manual vacuum aspiration;

21 (C) Electrical vacuum aspiration;

22 (D) Dilation and evacuation;

23 (E) Combined induction abortion and dilation and evacuation;

1 (F) Induction abortion with prostaglandins;

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

4 (H) Induction abortion, other;

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

6 (J) Method not listed (specify).

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

10 (4) Age and race of the patient;

11 (5) If the probable post-fertilization age was determined to
12 be twenty or more weeks, the basis of the determination that the
13 pregnant woman had a condition which so complicated her medical
14 condition as to necessitate the abortion of her pregnancy to avert
15 her death or to avert serious risk of substantial and irreversible
16 physical impairment of a major bodily function, not including
17 psychological or emotional conditions;

18 (6) If the probable post-fertilization age was determined to
19 be twenty or more weeks, whether or not the method of abortion used
20 was one that, in reasonable medical judgment, provided the best
21 opportunity for the unborn child to survive and, if such a method
22 was not used, the basis of the determination that termination of
23 the pregnancy in that manner would pose a greater risk either of

1 the death of the pregnant woman or of the substantial and
2 irreversible physical impairment of a major bodily function, not
3 including psychological or emotional conditions, of the woman than
4 would other available methods.

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

14 (1) To the Attorney General or a prosecuting attorney with
15 appropriate jurisdiction pursuant to a criminal investigation;

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

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

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

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

10 (d) Any physician who fails to submit a report by the end of
11 thirty days following the due date shall be subject to a late fee
12 of \$1,000, for each additional thirty-day period or portion of a
13 thirty-day period the report is overdue. Any physician required to
14 report in accordance with this article who has not submitted a
15 report, or has submitted only an incomplete report, more than six
16 months following the due date, may, in an action brought by the
17 department, be directed by a court of competent jurisdiction to
18 submit a complete report within a period stated by court order or
19 be subject to civil contempt. Intentional or reckless failure by
20 any physician to conform to any requirement of this section, other
21 than late filing of a report, constitutes "unprofessional conduct"
22 pursuant to the provisions of section one, article fourteen,
23 chapter thirty of this code. Intentional or reckless failure by any

1 physician to submit a complete report in accordance with a court
2 order constitutes "unprofessional conduct" pursuant to the
3 provisions of section one, article fourteen, chapter thirty of this
4 code. Intentional or reckless falsification of any report required
5 under this section is a misdemeanor.

6 (e) Within ninety days of the effective date of this article,
7 the Department of Health and Human Services shall adopt and
8 promulgate forms and regulations to assist in compliance with this
9 section. Subsection (a) of this section shall take effect so as to
10 require reports regarding all abortions performed or induced on and
11 after the first day of the first calendar month following the
12 effective date of the rules.

13 **§16-2M-6. Criminal penalties.**

14 Any person who intentionally or recklessly performs or induces
15 or attempts to perform or induce an abortion in violation of this
16 article is guilty of a felony and, upon conviction thereof, shall
17 be fined not more than \$5,000 or imprisoned in a state correctional
18 facility not less than one year, or both fined and imprisoned. No
19 penalty may be assessed against the woman upon whom the abortion is
20 performed or induced or attempted to be performed or induced.

21 **§16-2M-7. Civil remedies.**

22 (a) Any woman upon whom an abortion has been performed or
23 induced in violation of this article, or the father of the unborn

1 child who was the subject of such an abortion, may maintain an
2 action against the person who performed or induced the abortion in
3 intentional or reckless violation of this article for actual and
4 punitive damages. Any woman upon whom an abortion has been
5 attempted in violation of this article may maintain an action
6 against the person who attempted to perform or induce the abortion
7 in an intentional or reckless violation of this article for actual
8 and punitive damages.

9 (b) A cause of action for injunctive relief against any person
10 who has intentionally or recklessly violated this article may be
11 maintained by the woman upon whom an abortion was performed or
12 induced or attempted to be performed or induced in violation of
13 this article, by: (1) Any person who is the spouse, parent, sibling
14 or guardian of, or a current or former licensed health care
15 provider of, the woman upon whom an abortion has been performed or
16 induced or attempted to be performed or induced in violation of
17 this article; (2) by a prosecuting attorney with appropriate
18 jurisdiction; or (3) by the Attorney General. The injunction shall
19 prevent the abortion provider from performing or inducing or
20 attempting to perform or induce further abortions in violation of
21 this article in this state.

22 (c) If judgment is rendered in favor of the plaintiff in an
23 action described in this section, the court shall also render

1 judgment for a reasonable attorney's fee in favor of the plaintiff
2 against the defendant.

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

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

11 **§16-2M-8. Protection of privacy in court proceedings.**

12 In every civil or criminal proceeding or action brought under
13 this article, the court shall rule whether the anonymity of any
14 woman upon whom an abortion has been performed or induced or
15 attempted to be performed or induced shall be preserved from public
16 disclosure if she does not give her consent to such disclosure. The
17 court, upon motion or sua sponte, shall make such a ruling and,
18 upon determining that her anonymity should be preserved, shall
19 issue orders to the parties, witnesses and counsel and shall direct
20 the sealing of the record and exclusion of individuals from
21 courtrooms or hearing rooms to the extent necessary to safeguard
22 her identity from public disclosure. Each such order shall be
23 accompanied by specific written findings explaining why the

1 anonymity of the woman should be preserved from public disclosure,
2 why the order is essential to that end, how the order is narrowly
3 tailored to serve that interest and why no reasonable less
4 restrictive alternative exists. In the absence of written consent
5 of the woman upon whom an abortion has been performed or induced or
6 attempted to be performed or induced, anyone, other than a public
7 official, who brings an action under subsection (a) or (b), section
8 eight of this article shall do so under a pseudonym. This section
9 may not be construed to conceal the identity of the plaintiff or of
10 witnesses from the defendant or from attorneys for the defendant.

11 **§16-2M-9. Litigation Defense Fund.**

12 (a) There is created a special revenue fund known as the "West
13 Virginia Pain-Capable Unborn Child Protection Act Litigation Fund"
14 for the purpose of providing funds to pay for any costs and
15 expenses incurred by the state Attorney General in relation to
16 actions surrounding defense of this law.

17 (b) The fund shall be maintained by the Office of the Attorney
18 General.

19 (c) The fund shall consist of: (1) Appropriations made to the
20 account by the Legislature; and (2) any donations, gifts or grants
21 made to the account.

22 (d) The fund shall retain the interest income derived from the
23 moneys credited to the fund.

1 **§16-2M-10. Construction.**

2 This article may not be construed to repeal, by implication or
3 otherwise, any otherwise applicable provision of West Virginia law
4 regulating or restricting abortion. An abortion that complies with
5 this article but violates the provisions of or any otherwise
6 applicable provision of West Virginia law is unlawful as provided
7 in that provision. An abortion that complies with the provisions of
8 or any otherwise applicable provision of West Virginia law
9 regulating or restricting abortion but violates this article is
10 unlawful as provided in this article. If some or all of the
11 provisions of this article are ever temporarily or permanently
12 restrained or enjoined by judicial order, all other provisions of
13 West Virginia law regulating or restricting abortion shall be
14 enforced as though the restrained or enjoined provisions had not
15 been adopted: *Provided*, That whenever the temporary or permanent
16 restraining order of injunction is stayed or dissolved or otherwise
17 ceases to have effect, the provisions shall have full force and
18 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, to provide for civil remedies and remedies at law, and to call for reporting.

This article is new; therefore, strike throughs and underscoring have been omitted.