

**Senate Bill No. 487**

(By Senators Prezioso, Cann, Beach, M. Hall, D. Hall, Boley and Carmichael)

[Introduced March 8, 2013; referred to the Committee on the Judiciary; and then to the Committee on Finance.]

**FISCAL  
NOTE**

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, §16-2M-10 and §16-2M-11, all relating to creating the West Virginia Pain-Capable Unborn Child Protection Act; asserting 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; short title; legislative findings; definitions; determination of post-fertilization age; prohibiting abortion of unborn child of twenty or more weeks post-fertilization age; requiring reports from physicians who perform or attempt to perform abortions; criminal penalties; civil remedies; protection of privacy in court proceedings; creating a

1 litigation defense fund; and stating how article is to be  
2 construed.

3 *Be it enacted by the Legislature of West Virginia:*

4 That the Code of West Virginia, 1931, as amended, be amended  
5 by adding thereto a new article, designated §16-2M-1, §16-2M-2,  
6 §16-2M-3, §16-2M-4, §16-2M-5, §16-2m-6, §16-2M-7, §16-2M-8,  
7 §16-2M-9, §16-2M-10 and §16-2M-11, all to read as follows:

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

9 **§16-2M-1. Short title.**

10 This article may be cited as the "West Virginia Pain-Capable  
11 Unborn Child Protection Act".

12 **§16-2M-2. Legislative findings.**

13 The Legislature makes the following findings:

14 (a) Pain receptors (nociceptors) are present throughout the  
15 unborn child's entire body and nerves link these receptors to the  
16 brain's thalamus and subcortical plate by no later than twenty  
17 weeks.

18 (b) By eight weeks after fertilization, the unborn child  
19 reacts to touch. After twenty weeks, the unborn child reacts to  
20 stimuli that would be recognized as painful if applied to an adult  
21 human, for example, by recoiling.

22 (c) In the unborn child, application of such painful stimuli  
23 is associated with significant increases in stress hormones known

1 as the stress response.

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

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

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

19       (g) Substantial evidence indicates that children born missing  
20 the bulk of the cerebral cortex, those with hydranencephaly,  
21 nevertheless experience pain.

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

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

6           (j) The position, asserted by some medical experts, that the  
7 unborn child remains in a coma-like sleep state that precludes the  
8 unborn child experiencing pain is inconsistent with the documented  
9 reaction of unborn children to painful stimuli and with the  
10 experience of fetal surgeons who have found it necessary to sedate  
11 the unborn child with anesthesia to prevent the unborn child from  
12 thrashing about in reaction to invasive surgery.

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

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

20           (m) West Virginia's compelling state interest in protecting  
21 the lives of unborn children from the stage at which substantial  
22 medical evidence indicates that they are capable of feeling pain is  
23 intended to be separate from and independent of West Virginia's  
24 compelling state interest in protecting the lives of unborn

1 children from the stage of viability, and neither state interest is  
2 intended to replace the other.

3       (n) Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in  
4 which in the context of determining the severability of a state  
5 statute regulating abortion the United States Supreme Court noted  
6 that an explicit statement of legislative intent specifically made  
7 applicable to a particular statute is of greater weight than a  
8 general savings or severability clause, it is the intent of the  
9 state that if any one or more provisions, sections, subsections,  
10 sentences, clauses, phrases or words of this article or the  
11 application thereof to any person or circumstance is found to be  
12 unconstitutional, the same is hereby declared to be severable and  
13 the balance of this article shall remain effective notwithstanding  
14 such unconstitutionality. Moreover, the state declares that it  
15 would have passed this article and each provision, section,  
16 subsection, sentence, clause, phrase or word thereof, irrespective  
17 of the fact that any one or more provisions, sections, subsections,  
18 sentences, clauses, phrases or words, or any of their applications,  
19 were to be declared unconstitutional.

20 **§16-2M-3. Definitions.**

21       For purposes of this article:

22       (a) "Abortion" means the use or prescription of any  
23 instrument, medicine, drug or any other substance or device to  
24 terminate the pregnancy of a woman known to be pregnant with an

1 intention other than to increase the probability of a live birth,  
2 to preserve the life or health of the child after live birth, or to  
3 remove a dead unborn child who died as the result of natural causes  
4 in utero, accidental trauma or a criminal assault on the pregnant  
5 woman or her unborn child, and which causes the premature  
6 termination of the pregnancy.

7       (b) "Attempt to perform or induce an abortion" means an act,  
8 or an omission of a statutorily required act that, under the  
9 circumstances as the actor believes them to be, constitutes a  
10 substantial step in a course of conduct planned to culminate in the  
11 performance or induction of an abortion in this state in violation  
12 of this article.

13       (c) "Department" means the Department of Health and Human  
14 Resources.

15       (d) "Fertilization" means the fusion of a human spermatozoon  
16 with a human ovum.

17       (e) "Medical emergency" means a condition that, in reasonable  
18 medical judgment, so complicates the medical condition of the  
19 pregnant woman that it necessitates the immediate abortion of her  
20 pregnancy without first determining postfertilization age to avert  
21 her death or for which the delay necessary to determine post-  
22 fertilization age will create serious risk of substantial and  
23 irreversible physical impairment of a major bodily function, not  
24 including psychological or emotional conditions. No condition may

1 be deemed a medical emergency if based on a claim or diagnosis that  
2 the woman will engage in conduct which she intends to result in her  
3 death or in substantial and irreversible physical impairment of a  
4 major bodily function.

5 (f) "Physician" means any person licensed to practice medicine  
6 and surgery or osteopathic medicine and surgery in this state.

7 (g) "Post-fertilization age" means the age of the unborn child  
8 as calculated from the fusion of a human spermatozoon with a human  
9 ovum.

10 (h) "Probable post-fertilization age of the unborn child" means  
11 what, in reasonable medical judgment, will with reasonable  
12 probability be the post-fertilization age of the unborn child at  
13 the time the abortion is planned to be performed or induced.

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

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

20 (k) "Woman" means a female human being whether or not she has  
21 reached the age of majority.

22 **§16-2M-4. Determination of post-fertilization age.**

23 (a) Except in the case of a medical emergency, an abortion may  
24 not be performed or induced or be attempted to be performed or

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

10 (b) Failure by any physician to conform to any requirement of  
11 this section constitutes "unprofessional conduct" pursuant to  
12 section fourteen(7), article, chapter thirty of this code.

13 **§16-2M-5. Abortion of unborn child of twenty or more weeks post-**  
14 **fertilization age prohibited.**

15 (a) No person may perform or induce or attempt to perform or  
16 induce an abortion upon a woman when it has been determined, by the  
17 physician performing or inducing or attempting to perform or induce  
18 the abortion or by another physician upon whose determination that  
19 physician relies, that the probable post-fertilization age of the  
20 woman's unborn child is twenty or more weeks, unless, in reasonable  
21 medical judgment, she has a condition which so complicates her  
22 medical condition as to necessitate the abortion of her pregnancy  
23 to avert her death or to avert serious risk of substantial and  
24 irreversible physical impairment of a major bodily function, not



1 including psychological or emotional conditions. No such greater  
2 risk may be considered to exist if it is based on a claim or  
3 diagnosis that the woman will engage in conduct which she intends  
4 to result in her death or in substantial and irreversible physical  
5 impairment of a major bodily function.

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

21 **§16-2m-6. Reporting.**

22 (a) Any physician who performs or induces or attempts to  
23 perform or induce an abortion shall report to the department, on a  
24 schedule and in accordance with forms and regulations adopted and

1 promulgated by the department, that include:

2 (1) Post-fertilization age:

3 (i) If a determination of probable postfertilization age was  
4 made, whether ultrasound was employed in making the determination,  
5 and the week of probable post-fertilization age determined.

6 (ii) If a determination of probable post-fertilization age was  
7 not made, the basis of the determination that a medical emergency  
8 existed.

9 (2) Method of abortion: which of the following was employed:

10 (i) Medication abortion (such as, but not limited to,  
11 mifepristone/misoprostol or methotRexate/misoprostol);

12 (ii) Manual vacuum aspiration;

13 (iii) Electrical vacuum aspiration;

14 (iv) Dilation and evacuation;

15 (v) Combined induction abortion and dilation and evacuation

16 (vi) Induction abortion with prostaglandins;

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

19 (viii) Induction abortion, other;

20 (ix) Intact dilation and extraction (partial-birth); or

21 (x) Method not listed (specify).

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

1 (4) Age and race of the patient.

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

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

19 (b) Reports required by subsection (a) of this section may not  
20 contain the name or the address of the patient whose pregnancy was  
21 terminated, nor may the report contain any other information  
22 identifying the patient, except that each report shall contain a  
23 unique medical record identifying number, to enable matching the  
24 report to the patient's medical records. These reports shall be

1 maintained in strict confidence by the department, may not be  
2 available for public inspection, and may not be made available  
3 except:

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

6 (2) To the Attorney General or a prosecuting attorney pursuant  
7 to a civil investigation of the grounds for an action under  
8 subsection (b) of section eight of this article; or

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

11 (c) By June 30 of each year the department shall issue a  
12 public report providing statistics for the previous calendar year  
13 compiled from all of the reports covering that year submitted in  
14 accordance with this section for each of the items listed in  
15 subsection (1) of this section. Each such report shall also  
16 provide the statistics for all previous calendar years during which  
17 this section was in effect, adjusted to reflect any additional  
18 information from late or corrected reports. The department shall  
19 take care to ensure that none of the information included in the  
20 public reports could reasonably lead to the identification of any  
21 pregnant woman upon whom an abortion was performed, induced or  
22 attempted.

23 (d) Any physician who fails to submit a report by the end of  
24 thirty days following the due date is subject to a late fee of

1 \$1,000 for each additional thirty-day period or portion of a  
2 thirty-day period the report is overdue. Any physician required to  
3 report in accordance with this article who has not submitted a  
4 report, or has submitted only an incomplete report, more than six  
5 months following the due date, may, in an action brought by the  
6 department, be directed by a court of competent jurisdiction to  
7 submit a complete report within a period stated by court order or  
8 be subject to civil contempt. Intentional or reckless failure by  
9 any physician to conform to any requirement of this section, other  
10 than late filing of a report, constitutes "unprofessional conduct"  
11 pursuant to section fourteen, article seven, chapter thirty of this  
12 code. Intentional or reckless failure by any physician to submit  
13 a complete report in accordance with a court order constitutes  
14 "unprofessional conduct" pursuant to section fourteen, article  
15 seven, chapter thirty of this code. Intentional or reckless  
16 falsification of any report required under this section is a  
17 misdemeanor as provided in article three, chapter thirty of this  
18 code.

19 (e) Within ninety days of the effective date of this article,  
20 the Department of Health and Human Services shall adopt and  
21 promulgate forms and rules to assist in compliance with this  
22 section. Subsection (a) of this section shall take effect so as to  
23 require reports regarding all abortions performed or induced on and  
24 after the first day of the first calendar month following the

1 effective date of the rules.

2 **§16-2M-7. Criminal penalties.**

3 Any person who intentionally or recklessly performs or induces  
4 or attempts to perform or induce an abortion in violation of this  
5 article is guilty of a felony and, upon conviction thereof, shall  
6 be fined not more than \$1,000 or imprisoned in a state correctional  
7 facility not less than one year, or both fined and imprisoned. No  
8 penalty may be assessed against the woman upon whom the abortion is  
9 performed or induced or attempted to be performed or induced.

10 **§16-2M-8. Civil remedies.**

11 (a) Any woman upon whom an abortion has been performed or  
12 induced in violation of this article, or the father of the unborn  
13 child who was the subject of such an abortion, may maintain an  
14 action against the person who performed or induced the abortion in  
15 intentional or reckless violation of this article for actual and  
16 punitive damages. Any woman upon whom an abortion has been  
17 attempted in violation of this article may maintain an action  
18 against the person who attempted to perform or induce the abortion  
19 in an intentional or reckless violation of this article for actual  
20 and punitive damages.

21 (b) A cause of action for injunctive relief against any person  
22 who has intentionally or recklessly violated this article may be  
23 maintained by the woman upon whom an abortion was performed or  
24 induced or attempted to be performed or induced in violation of this

1 article: (1) By any person who is the spouse, parent, sibling or  
2 guardian of, or a current or former licensed health care provider  
3 of, the woman upon whom an abortion has been performed or induced  
4 or attempted to be performed or induced in violation of this  
5 article; or (2) by a county prosecuting attorney with appropriate  
6 jurisdiction; or (3) by the Attorney General. The injunction shall  
7 prevent the abortion provider from performing or inducing or  
8 attempting to perform or induce further abortions in violation of  
9 this article in this state.

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

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

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

22 **§16-2M-9. Protection of privacy in court proceedings.**

23 In every civil or criminal proceeding or action brought under  
24 this article, the court shall rule whether the anonymity of any

1 woman upon whom an abortion has been performed or induced or  
2 attempted to be performed or induced shall be preserved from public  
3 disclosure if she does not give her consent to the disclosure. The  
4 court, upon motion or sua sponte, shall make a ruling and, upon  
5 determining that her anonymity should be preserved, shall issue  
6 orders to the parties, witnesses and counsel and shall direct the  
7 sealing of the record and exclusion of individuals from courtrooms  
8 or hearing rooms to the extent necessary to safeguard her identity  
9 from public disclosure. Each such order shall be accompanied by  
10 specific written findings explaining why the anonymity of the woman  
11 should be preserved from public disclosure, why the order is  
12 essential to that end, how the order is narrowly tailored to serve  
13 that interest and why no reasonable less restrictive alternative  
14 exists. In the absence of written consent of the woman upon whom  
15 an abortion has been performed or induced or attempted to be  
16 performed or induced, anyone, other than a public official, who  
17 brings an action under subsection (a) or (b) of section eight of  
18 this article shall do so under a pseudonym. This section may not  
19 be construed to conceal the identity of the plaintiff or of  
20 witnesses from the defendant or from attorneys for the defendant.

21 **§16-2M-10. Litigation Defense Fund.**

22 (a) There is created a special revenue fund known as the West  
23 Virginia Pain-Capable Unborn Child Protection Act Litigation Fund  
24 for the purpose of providing funds to pay for any costs and expenses



1 incurred by the State Attorney General in relation to actions  
2 surrounding defense of this law.

3 (b) The fund shall be maintained by the Department of Health  
4 and Human Resources.

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

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

10 **§16-2M-11. How article construed.**

11 This article may not be construed to repeal, by implication or  
12 otherwise or any otherwise applicable provision of law regulating  
13 or restricting abortion. An abortion that complies with this  
14 article but violates the provisions of any otherwise applicable  
15 provision of law is unlawful as provided in that provision. An  
16 abortion that complies with the provisions of any otherwise  
17 applicable provision of law regulating or restricting abortion but  
18 violates this article is unlawful as provided in this article. If  
19 some or all of the provisions of this article are ever temporarily  
20 or permanently restrained or enjoined by judicial order, all other  
21 provisions of law regulating or restricting abortion shall be  
22 enforced as though the restrained or enjoined provisions had not  
23 been adopted: *Provided*, That whenever the temporary or permanent  
24 restraining order of injunction is stayed or dissolved, or otherwise

1 ceases to have effect, those provisions have full force and effect.

NOTE: The purpose of this bill is to create the "West Virginia Pain-Capable Unborn Child Protection Act" that asserts 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. The bill prohibits abortion of unborn child of twenty or more weeks post-fertilization age.

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