

1 **ENGROSSED**

2 **H. B. 4588**

3
4 (By Delegates Perry, Reynolds, Skaff, P. Smith,
5 Pino, Moye, Eldridge, Campbell, Stephens, Marcum
6 and Barker)

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

**FISCAL
NOTE**

10
11 A BILL to amend the Code of West Virginia, 1931, as amended, by
12 adding thereto a new article, designated §16-2M-1, §16-2M-2,
13 §16-2M-3, §16-2M-4, §16-2M-5, §16-2M-6, §16-2M-7, §16-2M-8,
14 and §16-2M-9, all relating to abortions generally and
15 protecting unborn children who are capable of experiencing
16 pain by prohibiting abortion after twenty weeks
17 post-fertilization except when the mother has a medical
18 emergency; providing for civil remedies; creating misdemeanors
19 and felonies; stating legislative findings; and providing
20 definitions.

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

22 That the Code of West Virginia, 1931, as amended, be amended
23 by adding thereto a new article, designated §16-2M-1, §16-2M-2,
24 §16-2M-3, §16-2M-4, §16-2M-5, §16-2M-6, §16-2M-7, §16-2M-8 and
25 §16-2M-9, all to read as follows:

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

2 **§16-2M-1. Legislative findings.**

3 The Legislature makes the following findings:

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

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

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

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

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

22 (6) The position, asserted by some medical experts, that the
23 unborn child is incapable of experiencing pain until a point later
24 in pregnancy than twenty weeks after fertilization predominately

1 rests on the assumption that the ability to experience pain depends
2 on the cerebral cortex and requires nerve connections between the
3 thalamus and the cortex. However, recent medical research and
4 analysis, especially since 2007, provides strong evidence for the
5 conclusion that a functioning cortex is not necessary to experience
6 pain.

7 (7) Substantial evidence indicates that children born missing
8 the bulk of the cerebral cortex, those with hydranencephaly,
9 nevertheless experience pain.

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

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

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

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

1 **§16-2M-2. Definitions.**

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

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

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

12 "Medical emergency" means a condition that, in reasonable
13 medical judgment, so complicates the medical condition of a
14 pregnant woman that it necessitates the immediate abortion of her
15 pregnancy without first determining post-fertilization age to avert
16 her death or for which the delay necessary to determine
17 post-fertilization age will create serious risk of substantial and
18 irreversible physical impairment of a major bodily function. No
19 condition may be considered a medical emergency if based on a claim
20 or diagnosis that the woman will engage in conduct which would
21 result in her death or in substantial and irreversible physical
22 impairment of a major bodily function.

23 "Physician" means a person with an unlimited license to
24 practice medicine or osteopathic medicine under the provisions of

1 article three or fourteen, chapter thirty of this code.

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

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

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

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

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

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

17 (a) Except in the case of a medical emergency, no abortion may
18 be performed or induced or be attempted to be performed or induced
19 unless the physician performing or inducing it has first made a
20 determination of the probable post fertilization age of the unborn
21 child or relied upon such a determination made by another
22 physician. In making this determination, the physician shall make
23 such inquiries of the woman and perform or cause to be performed
24 medical examinations and tests as a reasonably prudent physician,

1 knowledgeable about the case and the medical conditions involved,
2 would consider necessary to perform in making an accurate diagnosis
3 with respect to post fertilization age.

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

7 **§16-2M-4. Abortion of unborn child of twenty or more weeks post**
8 **fertilization age prohibited.**

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

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

16 **§16-2M-5. Reporting.**

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

22 (1) Post fertilization age:

23 (A) If a determination of probable post fertilization age was
24 made, whether ultrasound was employed in making the determination,

1 and the week of probable post fertilization age determined.

2 (B) If a determination of probable post fertilization age was
3 not made, the basis of the determination that a medical emergency
4 existed.

5 (2) Method of abortion:

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

8 (B) Manual vacuum aspiration;

9 (C) Electrical vacuum aspiration;

10 (D) Dilation and evacuation;

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

12 (F) Induction abortion with prostaglandins;

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

15 (H) Induction abortion;

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

17 (J) Method not listed (specify).

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

21 (4) Age and race of the patient;

22 (5) If the probable post fertilization age was determined to
23 be twenty or more weeks, the basis of the determination that the
24 pregnant woman had a condition which so complicated her medical

1 condition as to necessitate the abortion of her pregnancy to avert
2 her death or to avert serious risk of substantial and irreversible
3 physical impairment of a major bodily function, not including
4 psychological or emotional conditions;

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

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

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

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

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

6 (c) By June 30 of each year the Department of Health and Human
7 Resources shall issue a public report providing statistics for the
8 previous calendar year compiled from all of the reports covering
9 that year submitted in accordance with this section for each of the
10 items listed in subsection (a) of this section. Each report shall
11 provide the statistics for all previous calendar years during which
12 this section was in effect, adjusted to reflect any additional
13 information from late or corrected reports. The Department of
14 Health and Human Resources shall take care to ensure that none of
15 the information included in the public reports could reasonably
16 lead to the identification of any pregnant woman upon whom an
17 abortion was performed, induced or tempted.

18 (d) Any physician who fails to submit a report by the end of
19 thirty days following the due date is subject to a late fee of
20 \$1,000 for each additional thirty day period or portion of a thirty
21 day period the report is overdue. Any physician required to report
22 in accordance with this article who has not submitted a report or
23 has submitted only an incomplete report more than six months
24 following the due date, may, in an action brought by the

1 department, be directed by a court of competent jurisdiction to
2 submit a complete report within a period stated by court order or
3 be subject to civil contempt. Intentional or reckless failure by a
4 physician to conform to any requirement of this section, other than
5 late filing of a report, constitutes "professional incompetence"
6 pursuant to section fourteen, article three, chapter thirty of this
7 code. Intentional or reckless failure by a physician to submit a
8 complete report in accordance with a court order constitutes
9 "professional incompetence" pursuant to section fourteen, article
10 three, chapter thirty of this code. Intentional or reckless
11 falsification of any report required under this section is a
12 misdemeanor.

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

20 **§16-2M-6. Criminal penalties.**

21 Any person who intentionally or recklessly performs or induces
22 or attempts to perform or induce an abortion in violation of this
23 article is guilty of a felony and, upon conviction thereof, shall
24 be fined not more than \$5,000 or imprisoned in a state correctional

1 facility not less than one year nor more than five years, or both
2 fined and imprisoned. No penalty may be assessed against the woman
3 upon whom the abortion is performed or induced or attempted to be
4 performed or induced.

5 **§16-2M-7. Civil remedies.**

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

16 (b) A cause of action for injunctive relief against a person
17 who has intentionally or recklessly violated this article may be
18 maintained by the woman upon whom an abortion was performed or
19 induced or attempted to be performed or induced in violation of
20 this article, by: (1) A person who is the spouse, parent, sibling
21 or guardian of, or a current or former licensed health care
22 provider of, the woman upon whom an abortion has been performed or
23 induced or attempted to be performed or induced in violation of
24 this article; (2) or by a prosecuting attorney with appropriate

1 jurisdiction. The injunction prevents the abortion provider from
2 performing or inducing or attempting to perform or induce further
3 abortions in violation of this article in this state.

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

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

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

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

17 In every civil or criminal proceeding or action brought under
18 this article, the court shall rule whether the anonymity of any
19 woman upon whom an abortion has been performed or induced or
20 attempted to be performed or induced shall be preserved from public
21 disclosure if she does not give her consent to such disclosure.
22 The court, upon motion or sua sponte, shall make a ruling and, upon
23 determining that her anonymity should be preserved, issue orders to
24 the parties, witnesses and counsel and direct the sealing of the

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

15 **§16-2M-9. Construction.**

16 This article does not repeal, by implication or otherwise, any
17 otherwise applicable provision of West Virginia law regulating or
18 restricting abortion. An abortion that complies with this article
19 but violates the provisions of or any otherwise applicable
20 provision of West Virginia law is unlawful as provided in that
21 provision. An abortion that complies with the provisions of or any
22 otherwise applicable provision of West Virginia law regulating or
23 restricting abortion but violates this article is unlawful as
24 provided in this article. If some or all of the provisions of this

1 article are temporarily or permanently restrained or enjoined by
2 judicial order, all other provisions of West Virginia law
3 regulating or restricting abortion shall be enforced as though the
4 restrained or enjoined provisions had not been adopted: *Provided,*
5 That whenever the temporary or permanent restraining order of
6 injunction is stayed or dissolved or otherwise ceases to have
7 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.