

H. B. 2153

(By Delegate Perry, Pasdon, Hamrick, Rowan, Ambler, Romine, Evans, A., Hamilton,
Canterbury and Moye)

[Introduced January 20, 2015; referred to the
Committee on Health and Human Resources then the Judiciary.]

**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 and §16-2M-10, 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 and 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:

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, §16-2M-9 and §16-2M-10, 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) are present no later than sixteen
5 weeks after fertilization and nerves link these receptors to the brain's thalamus and subcortical plate
6 by no later than twenty weeks.

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

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

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

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

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

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

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

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

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

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

13 **§16-2M-2. Definitions.**

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

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

19 (2) "Fertilization" means the fusion of a human spermatozoon with a human ovum.

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

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

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

8 (5) "Post fertilization age" means the age of the unborn child as calculated from the
9 fertilization of the human ovum.

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

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

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

18 (9) "Woman" means a female human being whether or not she has reached the age of
19 majority.

20 **§16-2M-3. Determination of post fertilization age.**

21 (a) Except in the case of a medical emergency, no abortion may be performed or induced or
22 be attempted to be performed or induced unless the physician performing or inducing it has first

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

7 (b) Failure by any physician to conform to any requirement of this section constitutes
8 “unprofessional conduct” pursuant to section one, article fourteen, chapter thirty of this code.

9 **§16-2M-4. Abortion of unborn child of twenty or more weeks post fertilization age**
10 **prohibited.**

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

21 (b) When an abortion upon a woman whose unborn child has been determined to have a
22 probable post fertilization age of twenty or more weeks is not prohibited by subsection (a) of this

1 section, the physician shall terminate the pregnancy in the manner which, in reasonable medical
2 judgment, provides the best opportunity for the unborn child to survive, unless, in reasonable
3 medical judgment, termination of the pregnancy in that manner would pose a greater risk either of
4 the death of the pregnant woman or of the substantial and irreversible physical impairment of a major
5 bodily function, not including psychological or emotional conditions, of the woman than would other
6 available methods. No greater risk may be determined to exist if it is based on a claim or diagnosis
7 that the woman will engage in conduct which she intends to result in her death or in substantial and
8 irreversible physical impairment of a major bodily function.

9 **§16-2M-5. Reporting.**

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

13 (1) Post fertilization age:

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

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

18 (2) Method of abortion:

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

21 (B) Manual vacuum aspiration;

22 (C) Electrical vacuum aspiration;

- 1 (D) Dilation and evacuation;
- 2 (E) Combined induction abortion and dilation and evacuation;
- 3 (F) Induction abortion with prostaglandins;
- 4 (G) Induction abortion with intra-amniotic instillation such as, but not limited to, saline or
5 urea;
- 6 (H) Induction abortion;
- 7 (I) Intact dilation and extraction (partial-birth); or
- 8 (J) Method not listed (specify).
- 9 (3) Whether an intra-fetal injection was used in an attempt to induce fetal demise such as,
10 but not limited to, intrafetal potassium chloride or digoxin;
- 11 (4) Age and race of the patient;
- 12 (5) If the probable post fertilization age was determined to be twenty or more weeks, the basis
13 of the determination that the pregnant woman had a condition which so complicated her medical
14 condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk
15 of substantial and irreversible physical impairment of a major bodily function, not including
16 psychological or emotional conditions;
- 17 (6) If the probable post fertilization age was determined to be twenty or more weeks, whether
18 the method of abortion used was one that, in reasonable medical judgment, provided the best
19 opportunity for the unborn child to survive and, if such a method was not used, the basis of the
20 determination that termination of the pregnancy in that manner would pose a greater risk either of
21 the death of the pregnant woman or of the substantial and irreversible physical impairment of a major
22 bodily function, not including psychological or emotional conditions, of the woman than would other

1 available methods.

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

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

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

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

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

21 (d) Any physician who fails to submit a report by the end of thirty days following the due date
22 is subject to a late fee of \$1,000 for each additional thirty- day period or portion of a thirty- day

1 period the report is overdue. Any physician required to report in accordance with this article who
2 has not submitted a report or has submitted only an incomplete report more than six months
3 following the due date, may, in an action brought by the department, be directed by a court of
4 competent jurisdiction to submit a complete report within a period stated by court order or be subject
5 to civil contempt. Intentional or reckless failure by a physician to conform to any requirement of this
6 section, other than late filing of a report, constitutes “unprofessional conduct” pursuant to the
7 provisions of section one, article fourteen, chapter thirty of this code. Intentional or reckless failure
8 by a physician to submit a complete report in accordance with a court order constitutes
9 “unprofessional conduct” pursuant to the provisions of section one, article fourteen, chapter thirty
10 of this code. Intentional or reckless falsification of any report required under this section is a
11 misdemeanor.

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

17 **§16-2M-6. Criminal penalties.**

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

1 **§16-2M-7. Civil remedies.**

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

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

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

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

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

4 **§16-2M-8. Protection of privacy in court proceedings.**

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

20 **§16-2M-9. Litigation defense fund.**

21 (a) There is created a Special Revenue Fund known as the "West Virginia Pain-Capable
22 Unborn Child Protection Act Litigation Fund" for the purpose of providing funds to pay for any costs

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

3 (b) The fund shall be maintained by the office of the Attorney General.

4 (c) The fund shall consist of:

5 (1) Appropriations made to the account by the Legislature; and

6 (2) Donations, gifts or grants made to the account.

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

8 **§16-2M-10. Construction.**

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

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