

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Introduced

Senate Bill 10

BY SENATORS SYPOLT, FERNS, GAUNCH, KARNES,
LEONHARDT, TRUMP, WALTERS, BOLEY, BOSO, TAKUBO
AND BLAIR

[Introduced January 13, 2016;

Referred to the Committee on Health and Human
Resources; and then to the Committee on the Judiciary.]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section,
 2 designated §61-2-31, relating to the creation of the Unborn Child Protection from
 3 Dismemberment Abortion Act; providing definitions; making it unlawful for any person to
 4 purposely perform or attempt to perform a dismemberment abortion and thereby kill an
 5 unborn child unless necessary to prevent serious health risk to the unborn child's mother;
 6 hearing before West Virginia Board of Medicine; persons not liable for performing or
 7 attempting to perform a dismemberment abortion; who may seek injunctive relief; who
 8 may seek cause of action for civil damages against a person who has performed a
 9 dismemberment abortion; what damages may be awarded; requiring the court to rule
 10 whether the anonymity of any woman upon whom an abortion has been performed or
 11 attempted to be performed shall be preserved from public disclosure if she does not give
 12 her consent to such disclosure; declaring that section may not be construed as creating
 13 or recognizing a right to abortion, nor a right to a particular method of abortion; creating a
 14 felony offense for violations; and providing criminal penalties.

Be it enacted by the Legislature of West Virginia:

1 That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new
 2 section, designated §61-2-31, to read as follows:

ARTICLE 2. CRIMES AGAINST THE PERSON.

§61-2-31. Unborn Child Protection from Dismemberment Abortion Act.

1 (a) This section may be cited as the West Virginia Unborn Child Protection from
 2 Dismemberment Abortion Act.

3 (b) For purposes of this section:

4 (1) "Abortion" means the use or prescription of any instrument, medicine, drug, or any
 5 other substance or device: (i) To purposely kill the unborn child of a woman known to be pregnant;
 6 or (ii) to purposely terminate the pregnancy of a woman known to be pregnant, with a purpose
 7 other than: (A) After viability to produce a live birth and preserve the life and health of the child

8 born alive; or (B) to remove a dead unborn child.

9 (2) "Attempt to perform an abortion" means to do or omit to do anything that, under the
10 circumstances as the actor believes them to be, is an act or omission constituting a substantial
11 step in a course of conduct planned to culminate in oneself performing an abortion. Such
12 substantial steps include, but are not limited to: (i) Agreeing with an individual to perform an
13 abortion on that individual or on some other person, whether or not the term "abortion" is used in
14 the agreement, and whether or not the agreement is contingent on another factor such as receipt
15 of payment or a determination of pregnancy; or (ii) scheduling or planning a time to perform an
16 abortion on an individual, whether or not the term "abortion" is used, and whether or not the
17 performance is contingent on another factor such as receipt of payment or a determination of
18 pregnancy. This definition may not be construed to require that an abortion procedure actually
19 must be initiated for an attempt to occur.

20 (3) "Dismemberment abortion" means, with the purpose of causing the death of an unborn
21 child, purposely to dismember a living unborn child and extract him or her one piece at a time
22 from the uterus through use of clamps, grasping forceps, tongs, scissors or similar instruments
23 that, through the convergence of two rigid levers, slice, crush, or grasp a portion of the unborn
24 child's body to cut or rip it off. The term "dismemberment abortion" does not include an abortion
25 which uses suction to dismember the body of the unborn child by sucking fetal parts into a
26 collection container, although it does include an abortion in which a dismemberment abortion is
27 used to cause the death of an unborn child but suction is subsequently used to extract fetal parts
28 after the death of the unborn child.

29 (4) "Physician" means a person licensed to practice medicine and surgery or osteopathic
30 medicine and surgery, or otherwise legally authorized to perform an abortion.

31 (5) "Purposely" means that a person acts purposely with respect to a material element of
32 an offense when: (i) The element involves the nature of the conduct of the person or a result
33 thereof, and it is the conscious object of the person to engage in conduct of that nature or to cause

34 such a result; and (ii) if the element involves the attendant circumstances and the person is aware
35 of the existence of the circumstances or believes or hopes that they exist.

36 (6) "Serious health risk to the unborn child's mother" means that in reasonable medical
37 judgment she has a condition that so complicates her medical condition that it necessitates the
38 abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible
39 physical impairment of a major bodily function, not including psychological or emotional
40 conditions. No such condition may be determined to exist if it is based on a claim or diagnosis
41 that the woman will engage in conduct which she intends to result in her death or in substantial
42 and irreversible physical impairment of a major bodily function.

43 (7) "Woman" means a female human being whether or not she has reached the age of
44 majority.

45 (c) Notwithstanding any other provision of law to the contrary, it is unlawful for any person
46 to purposely perform or attempt to perform a dismemberment abortion and thereby kill an unborn
47 child unless necessary to prevent serious health risk to the unborn child's mother.

48 (d) A person accused in any proceeding of unlawful conduct under this section may seek
49 a hearing before the West Virginia Board of Medicine on whether the dismemberment abortion
50 was necessary to prevent serious health risk to the unborn child's mother. The board's findings
51 are admissible on that issue at any trial in which that unlawful conduct is alleged. Upon a motion
52 of the person accused, the court shall delay the beginning of the trial for not more than thirty days
53 to permit the hearing to take place.

54 (e) A woman upon whom an abortion is performed or attempted to be performed is not
55 liable for performing or attempting to perform a dismemberment abortion. Any nurse, technician,
56 secretary, receptionist or other employee or agent who is not a physician but who acts at the
57 direction of a physician, and any pharmacist or other individual who is not a physician but who
58 fills a prescription or provides instruments or materials used in an abortion at the direction of or to
59 a physician is not liable for performing or attempting to perform a dismemberment abortion.

60 (f) This section does not prevent abortion for any reason including rape and incest by any
61 other method.

62 (g) A cause of action for injunctive relief against a person who has performed or attempted
63 to perform a dismemberment abortion in violation of this section may be maintained by:

64 (1) A woman upon whom a dismemberment abortion was performed or attempted to be
65 performed;

66 (2) A person who is the spouse, parent or guardian of, or a current or former licensed
67 health care provider of, a woman upon whom such a dismemberment abortion was performed or
68 attempted to be performed; or

69 (3) A prosecuting attorney with appropriate jurisdiction.

70 (4) The injunction shall prevent the defendant from performing or attempting to perform
71 further dismemberment abortions in violation of this section in this state.

72 (h) A cause of action for civil damages against a person who has performed a
73 dismemberment abortion in violation of this section may be maintained by:

74 (1) Any woman upon whom a dismemberment abortion has been performed in violation
75 of this section;

76 (2) The father of the unborn child, if married to the woman at the time the dismemberment
77 abortion was performed; or

78 (3) If the woman had not attained the age of eighteen years at the time of the
79 dismemberment abortion or has died as a result of the abortion, the maternal grandparents of the
80 unborn child.

81 (i) No damages may be awarded a plaintiff if the pregnancy resulted from the plaintiff's
82 criminal conduct.

83 (j) Damages awarded in such an action shall include:

84 (1) Money damages for all injuries, psychological and physical, occasioned by the
85 dismemberment abortion; and

86 (2) Statutory damages equal to three times the cost of the dismemberment abortion.

87 (k) If judgment is rendered in favor of the plaintiff in an action described in subsection (g)
88 or (h), the court shall also render judgment for a reasonable attorney's fee in favor of the plaintiff
89 against the defendant.

90 (l) If judgment is rendered in favor of the defendant in an action described in subsection
91 (g) or (h) and the court finds that the plaintiff's suit was frivolous and brought in bad faith, the court
92 shall render judgment for a reasonable attorney's fee in favor of the defendant against the plaintiff.

93 (m) No attorney's fee may be assessed against the woman upon whom an abortion was
94 performed or attempted to be performed except in accordance with subsection (k) of this section.

95 (n) Any person who violates subsection (c) of this section is guilty of a felony and, upon
96 conviction thereof, shall be fined \$10,000 or imprisoned in a state correctional facility for not more
97 than two years, or both fined and imprisoned.

98 (o) In every civil, criminal or administrative proceeding or action brought under this section,
99 the court shall rule whether the anonymity of any woman upon whom an abortion has been
100 performed or attempted to be performed shall be preserved from public disclosure if she does not
101 give her consent to such disclosure. The court, upon motion or sua sponte, shall make such a
102 ruling and, upon determining that her anonymity should be preserved, shall issue orders to the
103 parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of
104 individuals from courtrooms or hearing rooms to the extent necessary to safeguard her identity
105 from public disclosure. Each such order shall be accompanied by specific written findings
106 explaining why the anonymity of the woman should be preserved from public disclosure, why the
107 order is essential to that end, how the order is narrowly tailored to serve that interest, and why no
108 reasonable less restrictive alternative exists. In the absence of written consent of the woman upon
109 whom an abortion has been performed or attempted to be performed, anyone other than a public
110 official who brings an action under subsection (f) or (g) shall do so under a pseudonym. This
111 section may not be construed to conceal the identity of the plaintiff or of witnesses from the

112 defendant or from attorneys for the defendant.

113 (p) Nothing in this section may be construed as creating or recognizing a right to abortion,

114 nor a right to a particular method of abortion.

NOTE: The purpose of this bill is to create the “Unborn Child Protection from Dismemberment Abortion Act. It provides definitions and makes it unlawful for any person to purposely perform or attempt to perform a dismemberment abortion and thereby kill an unborn child unless necessary to prevent serious health risk to the unborn child’s mother. The bill provides that persons accused of performing such an illegal act are entitled to a hearing before West Virginia Board of Medicine. It identifies persons not liable for performing or attempting to perform a dismemberment abortion. It provides who may seek injunctive relief or a cause of action for civil damages against a person who has performed a dismemberment abortion and what damages may be awarded. The bill requires the court to rule whether the anonymity of any woman upon whom an abortion has been performed or attempted to be performed shall be preserved from public disclosure if she does not give her consent to such disclosure. The bill declares that this section may not be construed as creating or recognizing a right to abortion, nor a right to a particular method of abortion. And, the bill creates a felony offense for violations and criminal penalties.

Strike-throughs indicate language that would be stricken from a heading or the present law, and underscoring indicates new language that would be added.