

E N R O L L E D

COMMITTEE SUBSTITUTE

for

H. B. 2568

(BY DELEGATE(S) SOBONYA, ARVON, KESSINGER,
ROWAN, SUMMERS, BORDER, BLAIR, ESPINOSA,
WAXMAN, MOYE AND ELDRIDGE)

[Passed February 25, 2015; in effect ninety days from passage.]

AN ACT 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 and §16-2M-7, all relating to prohibiting certain abortions; stating legislative findings; defining terms; requiring a calculation of gestational age before an abortion is performed or attempted, except in certain cases; prohibiting abortions when the gestational age of the fetus reaches pain capable gestational age; creating certain exceptions to that prohibition; requiring a physician performing an abortion of a fetus that has reached pain capable gestational age to use the process most likely to allow the fetus to survive, with certain exceptions; requiring reporting of all completed abortions and that the reports contain certain information regarding the abortion; requiring an annual public report that provides statistics of the

abortions while keeping the identities of the persons involved confidential; deeming violations by physicians and other licensed medical practitioners to be a breach of the standard of care and outside the scope of practice that is permitted by law; allowing for discipline from the applicable licensure board for that conduct, including, but not limited to, loss of professional license to practice for violation; constituting violations for nonphysician and nonlicensed medical practitioners as unauthorized practice of medicine and subject to criminal penalties; preserving existing legal remedies for violations; clarifying that no penalty may be assessed against a patient; and making provisions severable.

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 and §16-2M-7, all to read as follows:

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

§16-2M-1. Legislative findings.

1 The Legislature makes the following findings:

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

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

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

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

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

20 (6) The position, asserted by some medical experts, that the
21 unborn child is incapable of experiencing pain until a point later
22 in pregnancy than twenty weeks after fertilization, which point
23 in the pregnancy is generally consistent with twenty-two weeks
24 following the woman's last menstrual cycle, predominately rests
25 on the assumption that the ability to experience pain depends on
26 the cerebral cortex and requires nerve connections between the
27 thalamus and the cortex. However, recent medical research and
28 analysis, especially since 2007, provides strong evidence for the
29 conclusion that a functioning cortex is not necessary to
30 experience pain.

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

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

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

42 (10) Consequently, there is substantial medical evidence that
43 an unborn child is capable of experiencing pain by pain capable

44 gestational age as defined in subsection (7), section two, article
45 two-m of this chapter.

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

§16-2M-2. Definitions.

1 For purposes of this article:

2 (1) “Abortion” means abortion as that term is defined in
3 section two, article two-f of this chapter.

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

10 (3) “Fertilization” means the fusion of a human
11 spermatozoon with a human ovum.

12 (4) “Fetus” means the developing young in the uterus,
13 specifically the unborn offspring in the postembryonic period
14 from nine weeks after fertilization until birth.

15 (5) “Medical emergency” means a condition that, on the
16 basis of a reasonably prudent physician’s reasonable medical
17 judgment, so complicates the medical condition of a pregnant
18 female that it necessitates the immediate abortion of her
19 pregnancy without first determining gestational age to avert her
20 death or for which the delay necessary to determine gestational
21 age will create serious risk of substantial and irreversible
22 physical impairment of a major bodily function, not including

23 psychological or emotional conditions. No condition may be
24 deemed a medical emergency if based on a claim or diagnosis
25 that the woman will engage in conduct which she intends to
26 result in her death or in substantial and irreversible physical
27 impairment of a major bodily function.

28 (6) “Nonmedically viable fetus” means a fetus that contains
29 sufficient lethal fetal anomalies so as to render the fetus
30 medically futile or incompatible with life outside the womb in
31 the reasonable medical judgment of a reasonably prudent
32 physician.

33 (7) “Pain capable gestational age” means twenty-two weeks
34 since the first day of the woman’s last menstrual period. The
35 pain capable gestational age defined herein is generally
36 consistent with the time that is twenty weeks after fertilization.

37 (8) “Physician” means a person with an unrestricted license
38 to practice allopathic medicine pursuant to article three of
39 chapter thirty of this code or osteopathic medicine pursuant to
40 article fourteen, chapter thirty of this code.

41 (9) “Probable gestational age of the fetus” means, in
42 reasonable medical judgment and with reasonable probability,
43 the gestational age of the fetus at the time an abortion is planned
44 to be performed.

45 (10) “Reasonable medical judgment” means a medical
46 judgment that would be made by a reasonably prudent physician,
47 knowledgeable about the case and the treatment possibilities
48 with respect to the medical conditions involved.

§16-2M-3. Determination of gestational age.

1 Except in the case of a medical emergency or a
2 nonmedically viable fetus, no abortion may be performed or
3 induced or be attempted to be performed or induced unless the

4 physician performing or inducing it has first made a
5 determination of the probable gestational age of the fetus or
6 relied upon such a determination made by another physician. In
7 making this determination, the physician shall make inquiries of
8 the patient and perform or cause to be performed medical
9 examinations and tests as a reasonably prudent physician,
10 knowledgeable about the case and the medical conditions
11 involved, would consider necessary to perform in making an
12 accurate diagnosis with respect to gestational age.

§16-2M-4. Abortion of fetus of pain capable gestational age prohibited.

1 (a) No person may perform or induce, or attempt to perform
2 or induce, an abortion when it has been determined, by the
3 physician performing or inducing or attempting to perform or
4 induce the abortion or by another physician upon whose
5 determination that physician relies, that the probable gestational
6 age of the fetus has reached the pain capable gestational age,
7 unless in the reasonable medical judgment of a reasonably
8 prudent physician there exists a nonmedically viable fetus or the
9 patient has a condition that, on the basis of a reasonably prudent
10 physician's reasonable medical judgment, so complicates her
11 medical condition as to necessitate the abortion of her pregnancy
12 to avert her death or to avert serious risk of substantial and
13 irreversible physical impairment of a major bodily function, not
14 including psychological or emotional conditions. No condition
15 may be deemed a medical emergency if based on a claim or
16 diagnosis that the woman will engage in conduct which she
17 intends to result in her death or in substantial and irreversible
18 physical impairment of a major bodily function.

19 (b) When an abortion upon a patient whose fetus has been
20 determined to have a probable gestational age that has reached
21 the pain capable gestational age is not prohibited by subsection
22 (a) of this section, the physician shall terminate the pregnancy in

23 the manner which, in reasonable medical judgment, provides the
24 best opportunity for the fetus to survive, unless, in reasonable
25 medical judgment, termination of the pregnancy in that manner
26 would pose a greater risk either of the death of the patient or of
27 the substantial and irreversible physical impairment of a major
28 bodily function of the patient than would other available
29 methods.

§16-2M-5. Reporting.

1 (a) Any physician who performs or induces an abortion shall
2 report to the Bureau for Public Health. The reporting shall be on
3 a schedule and on forms set forth by the Secretary of the
4 Department of Health and Human Resources annually, no later
5 than December 31. The reports shall include the following
6 information:

7 (1) Probable gestational age:

8 (A) If a determination of probable gestational age was made,
9 whether ultrasound was employed in making the determination,
10 and the week of probable gestational age determined.

11 (B) If a determination of probable gestational age was not
12 made, the basis of the determination that a medical emergency
13 existed or that there existed a nonmedically viable fetus.

14 (2) Method of abortion;

15 (3) If the probable gestational age was determined to have
16 reached the pain capable gestational age, the basis of the
17 determination that there existed a nonmedically viable fetus or
18 that the patient had a condition which so complicated the
19 medical condition of the patient that it necessitated the abortion
20 of her pregnancy in order to avert her death or avert a serious
21 risk of substantial and irreversible physical impairment of a
22 major bodily function; and

23 (4) If the probable gestational age was determined to have
24 reached the pain capable gestational age, whether the method of
25 abortion used was one that, in reasonable medical judgment,
26 provided the best opportunity for the fetus to survive and, if such
27 a method was not used, the basis of the determination that
28 termination of the pregnancy in that manner would pose a
29 greater risk either of the death of the patient or of the substantial
30 and irreversible physical impairment of a major bodily function
31 of the patient than would other available methods.

32 (b) Reports required by subsection (a) of this section may
33 not contain the name or the address of the patient whose
34 pregnancy was terminated nor may the report contain any
35 information identifying the patient. These reports shall be
36 maintained in strict confidence by the department, may not be
37 available for public inspection, and may not be made available
38 except pursuant to court order.

39 (c) Beginning June 30, 2016, and annually after that, the
40 Department of Health and Human Resources shall issue a public
41 report providing statistics for the previous calendar year
42 compiled from all of the reports covering that year submitted in
43 accordance with this section for each of the items listed in
44 subsection (a) of this section. Each report shall provide the
45 statistics for all previous calendar years from the effective date
46 of this section, adjusted to reflect any additional information
47 from late or corrected reports. The Department of Health and
48 Human Resources shall take care to ensure that none of the
49 information included in the public reports could reasonably lead
50 to the identification of any patient upon whom an abortion was
51 performed or induced.

§16-2M-6. Penalties.

1 (a) Any physician or other licensed medical practitioner who
2 intentionally or recklessly performs or induces an abortion in

3 violation of this article is considered to have acted outside the
4 scope of practice permitted by law or otherwise in breach of the
5 standard of care owed to patients, and is subject to discipline
6 from the applicable licensure board for that conduct, including,
7 but not limited to, loss of professional license to practice.

8 (b) Any person, not subject to subsection (a) of this section,
9 who intentionally or recklessly performs or induces an abortion
10 in violation of this article is considered to have engaged in the
11 unauthorized practice of medicine in violation of section
12 thirteen, article three, chapter thirty of this code, and upon
13 conviction, subject to the penalties contained in that section.

14 (c) In addition to the penalties set forth in subsections (a)
15 and (b) of this section, a patient may seek any remedy otherwise
16 available to such patient by applicable law.

17 (d) No penalty may be assessed against any patient upon
18 whom an abortion is performed or induced or attempted to be
19 performed or induced.

§16-2M-7. Severability.

1 If any one or more provisions, sections, subsections,
2 sentences, clauses, phrases or words of this article or the
3 application thereof to any person or circumstance is found to be
4 unconstitutional or temporarily or permanently restrained or
5 enjoined by judicial order, or both, the same is declared to be
6 severable and the balance of this article shall remain effective
7 notwithstanding such judicial decision, including for all other
8 applications of each of the provisions, sections, subsections,
9 sentences, clauses, phrases or words of this article: *Provided,*
10 That whenever any judicial decision is stayed, dissolved, or
11 otherwise ceases to have effect, such provisions shall have full
12 force and effect.

That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman, House Committee

Chairman, Senate Committee

Originating in the House.

In effect ninety days from passage.

Clerk of the House of Delegates

Clerk of the Senate

Speaker of the House of Delegates

President of the Senate

The within _____ this the _____
day of _____, 2015.

Governor

