

# WEST VIRGINIA LEGISLATURE

## 2019 REGULAR SESSION

**Introduced**

### **House Bill 2903**

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HAMRICK, HICKS AND WESTFALL

[ Introduced February 7, 2019; Referred  
to the Committee on Health and Human Resources  
then the Judiciary.]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section,  
2 designated §16-2P-1, §16-2P-2, §16-2P-3, §16-2P-4, §16-2P-5, §16-2P-6, §16-2P-7,  
3 §16-2P-8, §16-2P-9, §16-2P-10, §16-2P-11, §16-2P-12, and §16-2P-13, all relating to  
4 enacting the Fetal Heartbeat Act; prohibiting abortions when a fetal heartbeat is detected;  
5 providing exceptions; making findings; establishing standards, requirements, and  
6 procedures; requiring documentation; requiring notice and acknowledgments; creating the  
7 Joint Legislative Committee on Adoption Promotion and Support; establishing penalties;  
8 permitting civil actions; defining terms; and providing for rule-making.

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

## **ARTICLE 2P. THE FETAL HEARTBEAT ACT.**

### **16-2P-1. Definitions.**

1 As used in this article:

2 “Conception” means fertilization.

3 “Contraceptive” means a drug, device, or chemical that prevents conception.

4 “Fetal heartbeat” means cardiac activity or the steady and repetitive rhythmic contraction  
5 of the fetal heart within the gestational sac.

6 “Fetus” means the human offspring developing during pregnancy from the moment of  
7 conception and includes the embryonic stage of development.

8 “Gestational sac” means the structure that comprises the extraembryonic membranes that  
9 envelop the fetus and that is typically visible by ultrasound after the fourth week of pregnancy.

10 “Intrauterine pregnancy” means a pregnancy in which the fetus is attached to the placenta  
11 within the uterus of the pregnant woman.

### **§16-2P-2. Legislative findings.**

1 The Legislature hereby finds, according to contemporary medical research, all of the  
2 following:

3 (1) As many as 30 percent of natural pregnancies end in spontaneous miscarriage.

4 (2) Less than five percent of all natural pregnancies end in spontaneous miscarriage after  
5 detection of fetal cardiac activity.

6 (3) Over 90 percent of in vitro pregnancies survive the first trimester if cardiac activity is  
7 detected in the gestational sac.

8 (4) Nearly 90 percent of in vitro pregnancies do not survive the first trimester where cardiac  
9 activity is not detected in the gestational sac.

10 (5) Fetal heartbeat, therefore, has become a key medical predictor that an unborn human  
11 individual will reach live birth.

12 (6) Cardiac activity begins at a biologically identifiable moment in time, normally when the  
13 fetal heart is formed in the gestational sac.

14 (7) The State of West Virginia has legitimate interests from the outset of the pregnancy in  
15 protecting the health of the woman and the life of an unborn human individual who may be born.

16 (8) In order to make an informed choice about whether to continue her pregnancy, the  
17 pregnant woman has a legitimate interest in knowing the likelihood of the fetus surviving to full-  
18 term birth based upon the presence of cardiac activity.

**§16-2P-3. Intrauterine pregnancies; persons intending to perform an abortion; detectable fetal heartbeat; rule-making.**

1 (a) This section applies only to intrauterine pregnancies.

2 (b) A person who intends to perform or induce an abortion on a pregnant woman shall  
3 determine whether there is a detectable fetal heartbeat of the unborn human individual the  
4 pregnant woman is carrying. The method of determining the presence of a fetal heartbeat shall  
5 be consistent with the person's good faith understanding of standard medical practice, provided  
6 that if rules have been adopted under subsection (c) of this section, the method chosen shall be  
7 one that is consistent with the rules. The person who determines the presence or absence of a  
8 fetal heartbeat shall record in the pregnant woman's medical record the estimated gestational age  
9 of the unborn human individual, the method used to test for a fetal heartbeat, the date and time

10 of the test, and the results of the test. The person who performs the examination for the presence  
11 of a fetal heartbeat shall give the pregnant woman the option to view or hear the fetal heartbeat.

12 (c) The State Director of Health shall propose rules for legislative approval in accordance  
13 with §29A-3-1 et seq. of this code to implement this section specifying the appropriate methods  
14 of performing an examination for the purpose of determining the presence of a fetal heartbeat of  
15 an unborn individual based on standard medical practice. The rules shall require only that an  
16 examination shall be performed externally.

17 (d) A person is not in violation of subsection (b) of this section if that person has performed  
18 an examination for the purpose of determining the presence of a fetal heartbeat in the fetus of an  
19 unborn human individual utilizing standard medical practice, that examination does not reveal a  
20 fetal heartbeat or the person has been informed by a physician who has performed the  
21 examination for a fetal heartbeat that the examination did not reveal a fetal heartbeat, and the  
22 person notes in the pregnant woman's medical records the procedure utilized to detect the  
23 presence of a fetal heartbeat.

**§16-2P-4. Intrauterine pregnancies; detectable heartbeat; penalties; exceptions.**

1 (a) This section applies only to intrauterine pregnancies.

2 (b) Except as provided in subsection (c) of this section, no person shall knowingly and  
3 purposefully perform or induce an abortion on a pregnant woman before determining in  
4 accordance with §16-2P-3(b) of this code whether the unborn human individual the pregnant  
5 woman is carrying has a detectable heartbeat.

6 (c) (1) Any physician or other licensed medical practitioner who intentionally or recklessly  
7 performs or induces an abortion in violation of this section is considered to have acted outside  
8 the scope of practice permitted by law or otherwise in breach of the standard of care owed to  
9 patients, and is subject to discipline from the applicable licensure board for that conduct, including,  
10 but not limited to, loss of professional license to practice.

11 (2) A person, not subject to subdivision (1) of this subsection, who intentionally or  
12 recklessly performs or induces an abortion in violation of this article is considered to have engaged  
13 in the unauthorized practice of medicine in violation of §30-3-13 of this code, and upon conviction,  
14 subject to the penalties contained in that section.

15 (3) In addition to the penalties set forth in subdivisions (1) and (2) of this subsection, a  
16 patient may seek any remedy otherwise available to such patient by applicable law.

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

19 (d) Subsection (b) of this section does not apply to a physician who performs or induces  
20 the abortion if the physician believes that a medical emergency exists that prevents compliance  
21 with that subsection.

22 (e) A physician who performs or induces an abortion on a pregnant woman based on the  
23 exception in subsection (c) of this section shall make written notations in the pregnant woman's  
24 medical records of both of the following:

25 (1) The physician's belief that a medical emergency necessitating the abortion existed;

26 (2) The medical condition of the pregnant woman that assertedly prevented compliance  
27 with subsection (b) of this section.

28 For at least seven years from the date the notations are made, the physician shall maintain  
29 in the physician's own records a copy of the notations.

30 (f) A person is not in violation of subsection (b) of this section if the person acts in  
31 accordance with §16-2P-3(b) of this code and the method used to determine the presence of a  
32 fetal heartbeat does not reveal a fetal heartbeat.

**§16-2P-5. Intrauterine pregnancies; heartbeat; notification; acknowledgment; penalties.**

1 (a) This section applies only to intrauterine pregnancies.

2 (b) If a person who intends to perform or induce an abortion on a pregnant woman has  
3 determined, under §16-2P-3 of this code, that the unborn human individual the pregnant woman

4 is carrying has a detectable heartbeat, the person shall not, except as provided in subsection (c)  
5 of this section, perform or induce the abortion until all of the following requirements have been  
6 met and at least 24 hours have elapsed after the last of the requirements is met:

7 (1) The person intending to perform or induce the abortion shall inform the pregnant  
8 woman in writing that the unborn human individual the pregnant woman is carrying has a fetal  
9 heartbeat.

10 (2) The person intending to perform or induce the abortion shall inform the pregnant  
11 woman, to the best of the person's knowledge, of the statistical probability of bringing the unborn  
12 human individual possessing a detectable fetal heartbeat to term based on the gestational age of  
13 the unborn human individual the pregnant woman is carrying or, if the State Director of Health  
14 has specified statistical probability information pursuant to rules adopted under subsection (d) of  
15 this section, shall provide to the pregnant woman that information.

16 (3) The pregnant woman shall sign a form acknowledging that she has received  
17 information from the person intending to perform or induce the abortion that the unborn human  
18 individual the pregnant woman is carrying has a fetal heartbeat and that the pregnant woman is  
19 aware of the statistical probability of bringing the unborn human individual the pregnant woman  
20 is carrying to term.

21 (c) Subsection (b) of this section does not apply if the person who intends to perform or  
22 induce the abortion believes that a medical emergency exists that prevents compliance with that  
23 subsection.

24 (d) The State Director of Health may propose rules for legislative approval in accordance  
25 with §29A-3-1 et seq. of this code that specify information regarding the statistical probability of  
26 bringing an unborn human individual possessing a detectable heartbeat to term based on the  
27 gestational age of the unborn human individual.

28 (e) This section does not have the effect of repealing or limiting any other provision of this  
29 code relating to informed consent for an abortion.

30 (f)(1) Any physician or other licensed medical practitioner who violates subsection (b) of  
31 this section is considered to have acted outside the scope of practice permitted by law or  
32 otherwise in breach of the standard of care owed to patients, and is subject to discipline from the  
33 applicable licensure board for that conduct, including, but not limited to, loss of professional  
34 license to practice.

35 (2) A person, not subject to subdivision (1) of this subsection, who violates subsection (b)  
36 of this section is considered to have engaged in the unauthorized practice of medicine in violation  
37 of section §30-3-13 of this code.

**§16-2P-6. Intrauterine pregnancies; prohibition; documentation; penalties; exceptions.**

1 (a) This section applies only to intrauterine pregnancies.

2 (b) Except as provided in subsection (c) of this section, no person shall knowingly and  
3 purposefully perform or induce an abortion on a pregnant woman with the specific intent of  
4 causing or abetting the termination of the life of the unborn human individual the pregnant woman  
5 is carrying and whose fetal heartbeat has been detected in accordance with §16-2P-3(b) of this  
6 code. Any physician or other licensed medical practitioner who violates this subsection is  
7 considered to have acted outside the scope of practice permitted by law or otherwise in breach  
8 of the standard of care owed to patients, and is subject to discipline from the applicable licensure  
9 board for that conduct, including, but not limited to, loss of professional license to practice. A  
10 person, who is not a physician or other licensed medical practitioner, who violates this subsection  
11 is considered to have engaged in the unauthorized practice of medicine in violation of section  
12 §30-3-13 of this code.

13 (c) Subsection (b) of this section does not apply to a physician who performs a medical  
14 procedure that, in the physician's reasonable medical judgment, is designed or intended to  
15 prevent the death of the pregnant woman or to prevent a serious risk of the substantial and  
16 irreversible impairment of a major bodily function of the pregnant woman.

17 A physician who performs a medical procedure as described in this subsection shall

18 declare, in a written document, that the medical procedure is necessary, to the best of the  
19 physician's reasonable medical judgment, to prevent the death of the pregnant woman or to  
20 prevent a serious risk of the substantial and irreversible impairment of a major bodily function of  
21 the pregnant woman. In the document, the physician shall specify the pregnant woman's medical  
22 condition that the medical procedure is asserted to address and the medical rationale for the  
23 physician's conclusion that the medical procedure is necessary to prevent the death of the  
24 pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a  
25 major bodily function of the pregnant woman.

26 A physician who performs a medical procedure as described in this subsection shall place  
27 the written document required by this subsection in the pregnant woman's medical records. The  
28 physician shall maintain a copy of the document in the physician's own records for at least seven  
29 years from the date the document is created.

30 (d) A person is not in violation of subsection (b) of this section if the person acts in  
31 accordance with §16-2P-3(b) of this code and the method used to determine the presence of a  
32 fetal heartbeat does not reveal a fetal heartbeat.

33 (e) Subsection (b) of this section does not have the effect of repealing or limiting any other  
34 provision of this code that restricts or regulates the performance or inducement of an abortion by  
35 a particular method or during a particular stage of a pregnancy.

**§16-2P-7. Abortion; requirements; documentation.**

1 (a) The provisions of this section are wholly independent of the requirements of §16-2P-3  
2 through §16-2P-6, inclusive, of this code.

3 (b) A person who performs or induces an abortion on a pregnant woman shall do  
4 whichever of the following is applicable:

5 (1) If the reason for the abortion purported is to preserve the health of the pregnant woman,  
6 the person shall specify in a written document the medical condition that the abortion is asserted  
7 to address and the medical rationale for the person's conclusion that the abortion is necessary to



8 address that condition.

9 (2) If the reason for the abortion is other than to preserve the health of the pregnant  
10 woman, the person shall specify in a written document that maternal health is not the purpose of  
11 the abortion.

12 (c) The person who specifies the information in the document described in subsection (b)  
13 of this section shall place the document in the pregnant woman's medical records. The person  
14 who specifies the information shall maintain a copy of the document in the person's own records  
15 for at least seven years from the date the document is created.

**§16-2P-8. Exemptions.**

1 Nothing in this article prohibits the sale, use, prescription, or administration of a drug,  
2 device, or chemical that is designed for contraceptive purposes.

**§16-2P-9. Pregnant women exempt from penalties.**

1 A pregnant woman on whom an abortion is performed or induced in violation of §16-2P-  
2 4, §16-2P-5 or §16-2P-6 of this code is not guilty of violating any of those sections, is not guilty of  
3 attempting to commit, conspiring to commit, or complicity in committing a violation of any of those  
4 sections, and is not subject to a civil penalty based on the abortion being performed or induced  
5 in violation of any of those sections.

**§16-2P-10. Civil actions.**

1 (a) A woman who meets either or both of the following criteria may file a civil action for the  
2 wrongful death of her unborn child:

3 (1) A woman on whom an abortion was performed or induced in violation of §16-2P-4(b)  
4 or §16-2P-6(a) of this code;

5 (2) A woman on whom an abortion was performed or induced who was not given the  
6 information described in §16-2P-5(b)(1) and §16-2P-5(b)(2) of this code or who did not sign a  
7 form described in §16-2P-5(b)(3) of this code.

8 (b) A woman who prevails in an action filed under subsection (a) of this section shall

9 receive both of the following from the person who committed the one or more acts described in  
10 that subsection:

11 (1) Damages in an amount equal to \$10,000 or an amount determined by the trier of fact  
12 after consideration of the evidence at the mother's election at any time prior to final judgment  
13 subject to the same defenses and requirements of proof, except any requirement of live birth, as  
14 would apply to a suit for the wrongful death of a child who had been born alive; and

15 (2) Court costs and reasonable attorney's fees.

16 (c) A determination that §16-2P-4(b), §16-2P-5(b) or §16-2P-6(b)(2) of this code is  
17 unconstitutional shall be a defense to an action filed under subsection (a) of this section alleging  
18 that the defendant violated the subsection that was determined to be unconstitutional.

**§16-2P-11. Joint Legislative Committee on Adoption Promotion and Support.**

1 (a) It is the intent of the Legislature that women whose pregnancies are protected under  
2 §16-2P-6(b) of this code be informed of available options for adoption.

3 (b) In furtherance of the intent expressed in subsection (a) of this section, there is hereby  
4 created the Joint Legislative Committee On Adoption Promotion And Support. The committee  
5 may review or study any matter that it considers relevant to the adoption process in this state,  
6 with priority given to the study or review of mechanisms intended to increase awareness of the  
7 process, increase its effectiveness, or both.

8 (c) The committee shall consist of three members of the House of Representatives  
9 appointed by the Speaker of the House of Delegates and three members of the Senate appointed  
10 by the President of the Senate. Not more than two members appointed by the Speaker and not  
11 more than two members appointed by the President may be of the same political party. Each  
12 member of the committee shall hold office during the Legislature in which the member is appointed  
13 and until a successor has been appointed. Any vacancies occurring among the members of the  
14 committee shall be filled in the manner of the original appointment.

15 (d) The committee has the same powers as other standing or select committees of the

16 Legislature.

**§16-2P-12. Inspection of medical records.**

1 The State Director of Health shall inspect the medical records from any facility that  
2 performs abortions to ensure that the physicians or other persons who perform abortions at that  
3 facility are in compliance with its reporting requirements. The facility shall make the medical  
4 records available for inspection to the State Director of Health but shall not release any personal  
5 medical information in the medical records that is prohibited by law.

**§16-2P-13. West Virginia Board of Medicine.**

1 (a) The West Virginia Board of Medicine, by an affirmative vote of no fewer than nine of  
2 its members, may limit, revoke, or suspend an individual's license to practice or license to  
3 recommend, refuse to grant a license to an individual, refuse to renew a license, refuse to  
4 reinstate a license, or reprimand or place on probation the holder of a license if the individual or  
5 license holder is found by the board to have committed fraud during the administration of the  
6 examination for a license to practice or to have committed fraud, misrepresentation, or deception  
7 in applying for, renewing, or securing any license to practice or license to recommend issued by  
8 the board.

9 (b) The board, by an affirmative vote of no fewer than nine members, shall, to the extent  
10 permitted by law, limit, revoke, or suspend an individual's license to practice or license to  
11 recommend, refuse to issue a license to an individual, refuse to renew a license refuse to reinstate  
12 a license, or reprimand or place on probation the holder of a license for one or more of the  
13 following reasons:

14 (1) Permitting one's name or one's license to practice to be used by a person, group, or  
15 corporation when the individual concerned is not actually directing the treatment given;

16 (2) Failure to maintain minimal standards applicable to the selection or administration of  
17 drugs, or failure to employ acceptable scientific methods in the selection of drugs or other  
18 modalities for treatment of disease;

- 19           (3) Except as otherwise provided in this code, selling, giving away, personally furnishing,  
20 prescribing, or administering drugs for other than legal and legitimate therapeutic purposes or a  
21 plea of guilty to, a judicial finding of guilt of, or a judicial finding of eligibility for intervention in lieu  
22 of conviction of, a violation of any federal or state law regulating the possession, distribution, or  
23 use of any drug; and
- 24           (4) Willfully betraying a professional confidence.

NOTE: The purpose of this bill is to enact the Fetal Heartbeat Act. The bill prohibits abortions when a fetal heartbeat is detected. The bill provides exceptions. The bill makes findings. The bill establishes standards, requirements, and procedures. The bill requires documentation. The bill requires notice and acknowledgments. The bill creates the Joint Legislative Committee on Adoption Promotion and Support. The bill establishes penalties. The bill permits civil actions. The bill defines terms. The bill provides for rule-making.

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