

# **WEST VIRGINIA LEGISLATURE**

## **2022 REGULAR SESSION**

**Introduced**

### **House Bill 4255**

BY DELEGATES BURKHAMMER, PINSON, MAYNOR,  
WORRELL, MARTIN, LINVILLE, MAZZOCCHI, AND HANNA

[Introduced January 19, 2022; Referred to the  
Committee on Health and Human Resources then the  
Judiciary]

1 A BILL to amend and reenact §16-2M-1, §16-2M-2, §16-2M-3, §16-2M-4, and §16-2M-5 of the  
 2 Code of West Virginia, 1931, as amended; and to amend said code by adding thereto a  
 3 new section, designated §16-2M-4a, all relating to delimiting the circumstances in which  
 4 an abortion may be performed or attempted; eliminating the 'pain capable gestational age'  
 5 threshold; establishing a threshold based upon the detection of a heartbeat inn the unborn  
 6 child; limiting abortion to circumstances of rape, incest, or threat to life or safety of the  
 7 mother; requiring abortions to be performed in hospitals by licensed physician; referencing  
 8 requirements for notification and consent by parent or guardian; and providing for  
 9 manslaughter charges if the woman is convicted, after the abortion, of making false  
 10 statements regarding allegations of sexual assault.

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

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

**§16-2M-1. Legislative findings.**

1 The Legislature makes the following findings based upon contemporary medical research:

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

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

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

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

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

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

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

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

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

29 ~~(10) Consequently, there is substantial medical evidence that an unborn child is capable~~  
30 ~~of experiencing pain by pain capable gestational age as defined in subsection (7), section two,~~  
31 ~~article two-m of this chapter.~~

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

35 (1) Less than five percent of all natural pregnancies end in spontaneous miscarriage after  
36 detection of fetal cardiac activity.

37 (2) Over 90 percent of in vitro pregnancies survive the first trimester if cardiac activity is

38 detected in the gestational sac.

39 (3) Nearly 90 percent of in vitro pregnancies do not survive the first trimester where cardiac  
40 activity is not detected in the gestational sac.

41 (4) Fetal heartbeat, therefore, may be a key medical predictor of the likelihood that an  
42 unborn human individual will achieve live birth.

43 (5) Cardiac activity begins at a biologically identifiable moment in time, normally when the  
44 fetal heart is formed in the gestational sac.

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

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

#### **§16-2M-2. Definitions.**

1 For purposes of this article:

2 (1) "Abortion" means abortion as that term is defined in §16-2F-1 *et seq.* of this code.

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

7 (3) "Fertilization" means the fusion of a human spermatozoon with a human ovum.

8 (4) "Fetus" means the developing young in the uterus. ~~specifically the unborn offspring in~~  
9 ~~the postembryonic period from nine weeks after fertilization until birth~~

10 (5) "Heartbeat" or "fetal heartbeat" means cardiac activity or the steady and repetitive  
11 rhythmic contraction of the fetal heart within the gestational sac.

12 ~~(5)~~ (6) "Medical emergency" means a condition that, on the basis of a reasonably prudent  
13 physician's reasonable medical judgment, so complicates the medical condition of a pregnant

14 female that it necessitates the immediate abortion of her pregnancy without first determining  
15 gestational age to avert her death or for which the delay necessary to determine gestational age  
16 will create serious risk of substantial and irreversible physical impairment of a major bodily  
17 function, not including psychological or emotional conditions. No condition may be deemed a  
18 medical emergency if based on a claim or diagnosis that the woman will engage in conduct which  
19 she intends to result in her death or in substantial and irreversible physical impairment of a major  
20 bodily function.

21 ~~(6)~~ (7) "Nonmedically viable fetus" means a fetus that contains sufficient lethal fetal  
22 anomalies so as to render the fetus medically futile or incompatible with life outside the womb in  
23 the reasonable medical judgment of a reasonably prudent physician.

24 ~~(7) "Pain capable gestational age" means twenty-two weeks since the first day of the~~  
25 ~~woman's last menstrual period. The pain capable gestational age defined herein is generally~~  
26 ~~consistent with the time that is twenty weeks after fertilization~~

27 (8) "Physician" means a person with an unrestricted license to practice allopathic medicine  
28 pursuant to §30-3-1 *et seq.* of this code or osteopathic medicine pursuant to §30-14-1 *et seq.* of  
29 this code.

30 (9) "Probable gestational age of the fetus" means, in reasonable medical judgment and  
31 with reasonable probability, the gestational age of the fetus at the time an abortion is planned to  
32 be performed.

33 (10) "Reasonable medical judgment" means a medical judgment that would be made by  
34 a reasonably prudent physician, knowledgeable about the case and the treatment possibilities  
35 with respect to the medical conditions involved.

**§16-2M-3. Determination of gestational age Persons intending to perform an abortion;**  
**detectable fetal heartbeat; rulemaking.**

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

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

9 (a) A person who intends to perform or induce an abortion on a pregnant woman shall first  
10 determine whether a fetal heartbeat of the unborn human child is detectable. The method of  
11 determining the presence of a fetal heartbeat shall be consistent with the person's good faith  
12 understanding of standard medical practice: *Provided*, That if rules have been adopted under  
13 subsection (b) of this section, the method chosen shall be one that is consistent with the rules.  
14 The person who determines the presence or absence of a fetal heartbeat shall record in the  
15 pregnant woman's medical record the estimated gestational age of the unborn human individual,  
16 the method used to test for a fetal heartbeat, the date and time of the test, and the results of the  
17 test.

18 (b) The State Director of Health shall propose rules for legislative approval in accordance  
19 with §29A-3-1 *et seq.* of this code to implement this section specifying the appropriate methods  
20 of performing an examination for the purpose of determining the presence of a fetal heartbeat of  
21 an unborn individual based on standard medical practice.

**§16-2M-4. Abortion of fetus ~~of pain capable gestational age~~ with detectable heartbeat  
prohibited.**

1 (a) No person may perform or induce, or attempt to perform or induce, an abortion when  
2 it has been determined, by the physician performing or inducing or attempting to perform or induce  
3 the abortion or by another physician upon whose determination that physician relies, that ~~the~~  
4 ~~probable gestational age of the fetus has reached the pain capable gestational age unless in the~~  
5 unborn child has a detectable heartbeat.

6 (b) No person may perform or induce, or attempt to perform or induce, an abortion upon  
7 a fetus with a detectable heartbeat unless in the reasonable medical judgment of a reasonably  
8 prudent physician there exists a nonmedically viable fetus or the patient has a condition that, on  
9 the basis of a reasonably prudent physician's reasonable medical judgment, so complicates her  
10 medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert  
11 serious risk of substantial and irreversible physical impairment of a major bodily function, not  
12 including psychological or emotional conditions.

13 (c) No condition may be deemed a medical emergency if based on a claim or diagnosis  
14 that the woman will engage in conduct which she intends to result in her death or in substantial  
15 and irreversible physical impairment of a major bodily function.

16 ~~(b) When an abortion upon a patient whose fetus has been determined to have a probable~~  
17 ~~gestational age that has reached the pain capable gestational age is not prohibited by subsection~~  
18 ~~(a) of this section, the physician shall terminate the pregnancy in the manner which, in reasonable~~  
19 ~~medical judgment, provides the best opportunity for the fetus to survive, unless, in reasonable~~  
20 ~~medical judgment, termination of the pregnancy in that manner would pose a greater risk either~~  
21 ~~of the death of the patient or of the substantial and irreversible physical impairment of a major~~  
22 ~~bodily function of the patient than would other available methods~~

**§16-2M-4a. Medical requirements to perform abortion; consent of parent or guardian**  
**required when patient is a minor.**

1 (a) No abortion may be performed or induced, and no person may attempt to perform or  
2 induce, an abortion except at a facility licensed as a hospital under the laws of this state or a  
3 facility operated as a hospital by the United States, by a licensed physician as defined in §16-2M-  
4 2 of this code.

5 (b) A physician shall not perform an abortion upon an unemancipated minor until the  
6 procedures under §16-2F-1 et seq. of this code have been completed regarding notification of  
7 and consent by a parent or guardian.

**§16-2M-5. Reporting.**

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

5 (1) Probable gestational age of the unborn child;

6 ~~(A) If a determination of probable gestational age was made, whether ultrasound was~~  
7 ~~employed in making the determination, and the week of probable gestational age determined.~~

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

10 (2) Manner or method of examination used to determine if a fetal heartbeat was present  
11 and the results of that examination;

12 ~~(2) (3) Method of abortion;~~

13 ~~(3) (4) If the probable gestational age was determined to have reached the pain capable~~  
14 ~~gestational age a heartbeat was detected in the unborn child, the basis of the determination that~~  
15 ~~there existed a nonmedically viable fetus or that the patient had a condition which so complicated~~  
16 ~~the medical condition of the patient that it necessitated the abortion of her pregnancy in order to~~  
17 ~~avert her death or avert a serious risk of substantial and irreversible physical impairment of a~~  
18 ~~major bodily function; and~~

19 ~~(4) (5) If the probable gestational age was determined to have reached the pain capable~~  
20 ~~gestational age a heartbeat was detected in the unborn child, whether the method of abortion~~  
21 ~~used was one that, in reasonable medical judgment, provided the best opportunity for the fetus to~~  
22 ~~survive and, if such a method was not used, the basis of the determination that termination of the~~  
23 ~~pregnancy in that manner would pose a greater risk either of the death of the patient or of the~~  
24 ~~substantial and irreversible physical impairment of a major bodily function of the patient than~~  
25 ~~would other available methods.~~



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

31 (c) Beginning ~~June 30, 2016~~ June 30, 2023, and annually after that, the Department of  
32 Health and Human Resources shall issue a public report providing statistics for the previous  
33 calendar year compiled from all of the reports covering that year submitted in accordance with  
34 this section for each of the items listed in subsection (a) of this section. Each report shall provide  
35 the statistics for all previous calendar years from the effective date of this section, adjusted to  
36 reflect any additional information from late or corrected reports. The Department of Health and  
37 Human Resources shall take care to ensure that none of the information included in the public  
38 reports could reasonably lead to the identification of any patient upon whom an abortion was  
39 performed or induced.

NOTE: The purpose of this bill is to establish new criteria on when abortions may be performed based upon the presence of a heartbeat in the unborn child and to carefully define those situations and circumstances in which abortions may be lawfully performed.

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