

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Introduced

Senate Bill 23

FISCAL

NOTE

By Senators Smith, Karnes, and Phillips

[Introduced January 11, 2023; referred
to the Committee on Health and Human Resources;
and then to the Committee on Finance]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
2 designated §16-2R-1, §16-2R-2, §16-2R-3, §16-2R-4, §16-2R-5, §16-2R-6, §16-2R-7,
3 §16-2R-8, §16-2R-9, §16-2R-10, and §16-2R-11, all relating to enacting the Fetal
4 Heartbeat Act; prohibiting abortions when a fetal heartbeat is detected; providing that the
5 article applies only to intrauterine pregnancies; providing exceptions; making findings;
6 providing for severability; establishing standards, requirements, and procedures; requiring
7 documentation; requiring notice and acknowledgments; establishing criminal penalties;
8 permitting civil actions; defining terms; and providing for rulemaking.

Be it enacted by the Legislature of West Virginia:

ARTICLE 2R. THE FETAL HEARTBEAT ACT.

16-2R-1. Definitions; legislative intent; severability.

1 (a) As used in this article:

2 "Conception" means fertilization.

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

4 "DNA" means deoxyribonucleic acid.

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

7 "Fetus" means the human offspring developing during pregnancy from the moment of
8 conception and includes the embryonic stage of development.

9 "Gestational age" means the age of an unborn human individual as calculated from the first
10 day of the last menstrual period of a pregnant woman.

11 "Gestational sac" means the structure that comprises the extraembryonic membranes that
12 envelop the fetus and that is typically visible by ultrasound after the fourth week of pregnancy.

13 "Intrauterine pregnancy" means a pregnancy in which the fetus is attached to the placenta
14 within the uterus of the pregnant woman.

15 "Medical emergency" means a condition that in a physician's good-faith medical judgment,

16 based upon the facts known to the physician at that time, so endangers the life of the pregnant
17 woman or poses a serious risk of the substantial and irreversible impairment of a major bodily
18 function of the pregnant woman as to necessitate the immediate performance or inducement of an
19 abortion.

20 "Physician" means an individual authorized pursuant to §30-3-1 et seq. of this code to
21 practice medicine and surgery, or an individual authorized pursuant to §30-14-1 et seq. of this
22 code to practice osteopathic medicine and surgery.

23 "Pregnancy" means the human female reproductive condition that begins with fertilization,
24 when the woman is carrying the developing human offspring, and that is calculated from the first
25 day of the last menstrual period of the woman.

26 "Serious risk of the substantial and irreversible impairment of a major bodily function"
27 means any medically diagnosed condition that so complicates the pregnancy of the woman as to
28 directly or indirectly cause the substantial and irreversible impairment of a major bodily function.

29 "Spontaneous miscarriage" means the natural or accidental termination of a pregnancy
30 and the expulsion of the fetus, typically caused by genetic defects in the fetus or physical
31 abnormalities in the pregnant woman.

32 "Standard medical practice" means the degree of skill, care, and diligence that a physician
33 of the same medical specialty would employ in like circumstances. As applied to the method used
34 to determine the presence of a fetal heartbeat for purposes of this article, "standard medical
35 practice" includes employing the appropriate means of detection depending on the estimated
36 gestational age of the fetus and the condition of the woman and her pregnancy.

37 "Unborn human individual" means an individual organism of the species homo sapiens
38 from fertilization until live birth.

39 (b)(1) It is the intent of the Legislature that a court judgment or order suspending
40 enforcement of any provision of this act is not to be regarded as tantamount to repeal of that
41 provision.

42 (2) After the issuance of a decision by the Supreme Court of the United States overruling
43 Roe v. Wade, 410 U.S. 113 (1973), the issuance of any other court order or judgment restoring,
44 expanding, or clarifying the authority of states to prohibit or regulate abortion entirely or in part, or
45 the effective date of an amendment to the Constitution of the United States restoring, expanding,
46 or clarifying the authority of states to prohibit or regulate abortion entirely or in part, the Attorney
47 General may apply to the pertinent state or federal court for either or both of the following:

48 (A) A declaration that any one or more sections specified in this article are constitutional.

49 (B) A judgment or order lifting an injunction against the enforcement of any one or more
50 sections of this article.

51 (c) If the Attorney General fails to apply for the relief described in subdivision (2),
52 subsection (b) of this section within the 30 day period after an event described in that section
53 occurs, any county prosecutor may apply to the appropriate state or federal court for such relief.

54 (d) If any provision of this article is held invalid, or if the application of such provision to any
55 person or circumstance is held invalid, the invalidity of that provision does not affect any other
56 provision of this article and the other provisions of this article that can be given effect without the
57 invalid provision or application, and to this end the provisions of those sections are severable. It is
58 furthermore the intent of the Legislature that the provisions of this article are not to have the effect
59 of repealing or limiting any other laws of this state, except as specified by this article.

§16-2R-2. Legislative findings; applicability.

1 (a) 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.

19 (b) This article applies only to intrauterine pregnancies.

§16-2R-3. Intrauterine pregnancies; persons intending to perform an abortion; detectable fetal heartbeat; rulemaking.

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

10 (b) The State Director of Health shall propose rules for legislative approval in accordance
11 with §29A-3-1 et seq. of this code to implement this section specifying the appropriate methods of
12 performing an examination for the purpose of determining the presence of a fetal heartbeat of an

13 unborn individual based on standard medical practice.

§16-2R-4. Detectable heartbeat; penalties; exceptions.

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

5 Whoever violates this subsection of performing or inducing an abortion before determining
6 whether there is a detectable fetal heartbeat is guilty of a felony and, upon conviction, shall be
7 fined not more than \$10,000 or confined in a state correctional facility for not less than one year nor
8 more than two years, or both fined and confined.

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

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

- 15 (1) The physician's belief that a medical emergency necessitating the abortion existed; and
- 16 (2) The medical condition of the pregnant woman that assertedly prevented compliance
17 with subsection (a) of this section.

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

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

§16-2R-5. Heartbeat; notification; acknowledgment; penalties.

1 (a) If a person who intends to perform or induce an abortion on a pregnant woman has

2 determined, under §16-2R-3 of this code, that the unborn human individual the pregnant woman is
3 carrying has a detectable heartbeat, the person shall not, except as provided in subsection (b) of
4 this section, perform or induce the abortion until all of the following requirements have been met
5 and at least 24 hours have elapsed after the last of these requirements is met:

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

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

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

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

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

27 (d) This section does not have the effect of repealing or limiting any other provision of this

28 code relating to informed consent for an abortion.

§16-2R-6. Abortion prohibition; documentation; penalties; exceptions.

1 (a) Except as provided in subsection (b) of this section, no person shall knowingly and
2 purposefully perform or induce an abortion on a pregnant woman with the specific intent of causing
3 or abetting the termination of the life of the unborn human individual the pregnant woman is
4 carrying and whose fetal heartbeat has been detected in accordance with §16-2R-3(a) of this
5 code.

6 Whoever violates this subsection of performing or inducing an abortion before determining
7 whether there is a detectable fetal heartbeat is guilty of a felony and, upon conviction, shall be
8 fined not more than \$10,000 or confined in a state correctional facility for not less than one year nor
9 more than two years, or both fined and confined.

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

14 A physician who performs a medical procedure as described in this subsection shall
15 declare, in a written document, that the medical procedure is necessary, to the best of the
16 physician's reasonable medical judgment, to prevent the death of the pregnant woman or to
17 prevent a serious risk of the substantial and irreversible impairment of a major bodily function of
18 the pregnant woman. In the document, the physician shall specify the pregnant woman's medical
19 condition that the medical procedure is asserted to address and the medical rationale for the
20 physician's conclusion that the medical procedure is necessary to prevent the death of the
21 pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a
22 major bodily function of the pregnant woman.

23 A physician who performs a medical procedure as described in this subsection shall place
24 the written document required by this subsection in the pregnant woman's medical records. The

25 physician shall maintain a copy of the document in the physician's own records for at least seven
26 years from the date the document is created.

27 (c) A person is not in violation of subsection (a) of this section if the person acts in
28 accordance with §16-2R-3(a) of this code and the method used to determine the presence of a
29 fetal heartbeat does not reveal a fetal heartbeat.

30 (d) Subsection (a) of this section does not have the effect of repealing or limiting any other
31 provision of this code that restricts or regulates the performance or inducement of an abortion by a
32 particular method or during a particular stage of a pregnancy.

§16-2R-7. Abortion; requirements; documentation.

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

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

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

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

§16-2R-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.

§16-2R-9. Pregnant women exempt from penalties.

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

§16-2R-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 §16-2R-4 or
 4 §16-2R-6 of this code.

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

7 (b) A woman who prevails in an action filed under subsection (a) of this section shall
 8 receive both of the following from the person who committed the one or more acts described in that
 9 subsection:

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

14 (2) Court costs and reasonable attorney’s fees.

15 (c) If the defendant in an action filed under subsection (a) of this section prevails and the
 16 court finds that the commencement of the action constitutes frivolous conduct and that the
 17 defendant was adversely affected by the frivolous conduct, the court shall award reasonable
 18 attorney’s fees.

§16-2R-11. Reporting of information.

1 The information required to be recorded in §16-2R-3, §16-2R-4, §16-2R-6, and §16-2R-7
 2 of this code shall be reported to the State Director of Health in accordance with the rules governing

- 3 the reporting of other abortion information.