
HOUSE BILL 1775

State of Washington

65th Legislature

2017 Regular Session

By Representatives Van Werven, Shea, McCabe, Hargrove, Short, Koster, Buys, McCaslin, Volz, Kraft, Barkis, Rodne, MacEwen, Klippert, McDonald, Young, Pike, Holy, and Muri

Read first time 01/30/17. Referred to Committee on Health Care & Wellness.

1 AN ACT Relating to enacting the Washington pain capable unborn
2 child protection act; amending RCW 9.02.170, 9.02.100, 9.02.110, and
3 9.02.900; adding new sections to chapter 9.02 RCW; creating new
4 sections; and prescribing penalties.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 NEW SECTION. **Sec. 1.** The legislature finds that:

7 (1) Pain receptors are present throughout the unborn child's
8 entire body and nerves link these receptors to the brain's thalamus
9 and subcortical plate by no later than twenty weeks;

10 (2) By eight weeks after fertilization, the unborn child reacts
11 to touch. After twenty weeks, the unborn child reacts to stimuli that
12 would be recognized as painful if applied to an adult human, for
13 example, by recoiling;

14 (3) In the unborn child, application of such painful stimuli is
15 associated with significant increases in stress hormones known as the
16 stress response;

17 (4) Subjection to such painful stimuli is associated with long-
18 term harmful neurodevelopmental effects, such as altered pain
19 sensitivity and, possibly, emotional, behavioral, and learning
20 disabilities later in life;

1 (5) For the purposes of surgery on unborn children, fetal
2 anesthesia is routinely administered and is associated with a
3 decrease in stress hormones compared to their levels when painful
4 stimuli are applied without such anesthesia;

5 (6) The position, asserted by some medical experts, that the
6 unborn child is incapable of experiencing pain until a point later in
7 pregnancy than twenty weeks after fertilization predominately rests
8 on the assumption that the ability to experience pain depends on the
9 cerebral cortex and requires nerve connections between the thalamus
10 and the cortex. However, recent medical research and analysis,
11 especially since 2007, provides strong evidence for the conclusion
12 that a functioning cortex is not necessary to experience pain;

13 (7) Substantial evidence indicates that children born missing the
14 bulk of the cerebral cortex, those with hydranencephaly, nevertheless
15 experience pain;

16 (8) In adults, stimulation or ablation of the cerebral cortex
17 does not alter pain perception, while stimulation or ablation of the
18 thalamus does;

19 (9) Substantial evidence indicates that structures used for pain
20 processing in early development differ from those of adults, using
21 different neural elements available at specific times during
22 development, such as the subcortical plate, to fulfill the role of
23 pain processing;

24 (10) The position, asserted by some medical experts, that the
25 unborn child remains in a coma-like sleep state that precludes the
26 unborn child experiencing pain is inconsistent with the documented
27 reaction of unborn children to painful stimuli and with the
28 experience of fetal surgeons who have found it necessary to sedate
29 the unborn child with anesthesia to prevent the unborn child from
30 thrashing about in reaction to invasive surgery;

31 (11) Consequently, there is substantial medical evidence that an
32 unborn child is capable of experiencing pain by twenty weeks after
33 fertilization;

34 (12) It is the purpose of this state to assert a compelling state
35 interest in protecting the lives of unborn children from the stage at
36 which substantial medical evidence indicates that they are capable of
37 feeling pain;

38 (13) Washington's compelling state interest in protecting the
39 lives of unborn children from the stage at which substantial medical
40 evidence indicates that they are capable of feeling pain is intended

1 to be separate from and independent of Washington's compelling state
2 interest in protecting the lives of unborn children from the stage of
3 viability, and neither state interest is intended to replace the
4 other;

5 (14) Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which
6 in the context of determining the severability of a state statute
7 regulating abortion, the United States supreme court noted that an
8 explicit statement of legislative intent specifically made applicable
9 to a particular statute is of greater weight than a general savings
10 or severability clause, it is the intent of the state that if any one
11 or more provisions, sections, subsections, sentences, clauses,
12 phrases, or words of the act or the application thereof to any person
13 or circumstance is found to be unconstitutional, the same is hereby
14 declared to be severable and the balance of the act shall remain
15 effective notwithstanding such unconstitutionality. Moreover, this
16 state declares that it would have enacted this act, and each
17 provision, section, subsection, sentence, clause, phrase, or word
18 thereof, irrespective of the fact that any one or more provisions,
19 sections, subsections, sentences, clauses, phrases, or words, or any
20 of their applications, were to be declared unconstitutional.

21 **Sec. 2.** RCW 9.02.170 and 1992 c 1 s 8 are each amended to read
22 as follows:

23 For purposes of this chapter:

24 (1) "Viability" means the point in the pregnancy when, in the
25 judgment of the physician on the particular facts of the case before
26 such physician, there is a reasonable likelihood of the fetus's
27 sustained survival outside the uterus without the application of
28 extraordinary medical measures.

29 (2) "Abortion" means any medical treatment intended to induce the
30 termination of a pregnancy except for the purpose of producing a live
31 birth.

32 (3) "Pregnancy" means the reproductive process beginning with the
33 implantation of an embryo.

34 (4) "Physician" means a physician licensed to practice under
35 chapter 18.57 or 18.71 RCW in the state of Washington.

36 (5) "Health care provider" means a physician or a person acting
37 under the general direction of a physician.

1 (6) "State" means the state of Washington and counties, cities,
2 towns, municipal corporations, and quasi-municipal corporations in
3 the state of Washington.

4 (7) "Private medical facility" means any medical facility that is
5 not owned or operated by the state.

6 (8) "Attempt to perform or induce an abortion" means an act, or
7 an omission of a statutorily required act, that, under the
8 circumstances, as the actor believes them to be.

9 (9) "Fertilization" means the fusion of a human spermatozoon with
10 a human ovum.

11 (10) "Fetal anomaly" means that, in reasonable medical judgment,
12 the unborn child has a profound and irremediable congenital or
13 chromosomal anomaly that, with or without the provision of life-
14 preserving treatment, would be incompatible with sustaining life
15 after birth.

16 (11) "Medical emergency" means a condition that, in reasonable
17 medical judgment, so complicates the medical condition of the
18 pregnant woman that it necessitates the immediate abortion of her
19 pregnancy without first determining postfertilization age to avert
20 her death or for which the delay necessary to determine
21 postfertilization age will create serious risk of substantial and
22 irreversible physical impairment of a major bodily function, not
23 including psychological or emotional conditions. No condition must be
24 considered a medical emergency if based on a claim or diagnosis that
25 the woman will engage in conduct which she intends to result in her
26 death or in substantial and irreversible physical impairment of a
27 major bodily function.

28 (12) "Postfertilization" means the age of the unborn child as
29 calculated from fertilization.

30 (13) "Probable postfertilization age of the unborn child" means
31 what, in reasonable judgment, will with reasonable probability be the
32 postfertilization age of the unborn child at the time the abortion is
33 planned to be performed or induced.

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

38 (15) "Unborn child" or "fetus" means an individual organism of
39 the species homo sapiens from fertilization until live birth.

1 NEW SECTION. **Sec. 3.** A new section is added to chapter 9.02 RCW
2 to read as follows:

3 Except in the case of a medical emergency or fetal anomaly, no
4 abortion must be performed or induced or be attempted to be performed
5 or induced unless the physician performing or inducing it has first
6 made a determination of the probable postfertilization age of the
7 unborn child or relied upon such a determination made by another
8 physician. In making such a determination, the physician shall make
9 such inquiries of the woman and perform or cause to be performed such
10 medical examinations and tests as a reasonably prudent physician,
11 knowledgeable about the case and the medical conditions involved,
12 would consider necessary to perform in making an accurate diagnosis
13 with respect to postfertilization age.

14 NEW SECTION. **Sec. 4.** A new section is added to chapter 9.02 RCW
15 to read as follows:

16 (1) No person shall perform or induce or attempt to perform or
17 induce an abortion upon a woman when it has been determined, by the
18 physician performing or inducing or attempting to perform or induce
19 the abortion or by another physician upon whose determination that
20 physician relies, that the probable postfertilization age of the
21 woman's unborn child is at the point of viability or beyond, except
22 in the case of fetal anomaly or, in reasonable medical judgment, she
23 has a condition which so complicates her medical condition as to
24 necessitate the abortion of her pregnancy to avert her death or to
25 avert serious risk of substantial and irreversible physical
26 impairment of a major bodily function, not including psychological or
27 emotional conditions. No such greater risk must be considered to
28 exist if it is based on a claim or diagnosis that the woman will
29 engage in conduct, which she intends to result in her death or in
30 substantial and irreversible physical impairment of a major bodily
31 function.

32 (2) When an abortion upon a woman whose unborn child has been
33 determined to have a probable postfertilization age that is at the
34 point of viability or beyond is not prohibited by subsection (1) of
35 this section, the physician shall terminate the pregnancy in the
36 manner which, in reasonable medical judgment, provides the best
37 opportunity for the unborn child to survive, unless, in reasonable
38 medical judgment, termination of the pregnancy in that manner would
39 pose a greater risk either of the death of the pregnant woman or of

1 the substantial and irreversible physical impairment of a major
2 bodily function, not including psychological or emotional conditions,
3 of the woman than would other available methods. No such greater risk
4 must be considered to exist if it is based on a claim or diagnosis
5 that the woman will engage in conduct, which she intends to result in
6 her death or in substantial and irreversible physical impairment of a
7 major bodily function.

8 NEW SECTION. **Sec. 5.** A new section is added to chapter 9.02 RCW
9 to read as follows:

10 (1) Any hospital or health care facility in which an abortion is
11 performed must report to the department of health the following
12 information:

13 (a) Postfertilization age:

14 (i) If a determination of probable postfertilization age was
15 made, whether ultrasound was employed in making the determination,
16 and the week of probable postfertilization age determined; or

17 (ii) If a determination of probable postfertilization age was not
18 made, the basis of the determination that a medical emergency
19 existed;

20 (b) Method of abortion, of which the following was employed:

21 (i) Medication abortion such as, but not limited to, mifepristone
22 and misoprostol or methotrexate and misoprostol;

23 (ii) Manual vacuum aspiration;

24 (iii) Electrical vacuum aspiration;

25 (iv) Dilation and evacuation;

26 (v) Combined induction abortion and dilation and evacuation;

27 (vi) Induction abortion with prostaglandins;

28 (vii) Induction abortion with intraamniotic instillation such as,
29 but not limited to, saline or urea;

30 (viii) Induction abortion; and

31 (ix) Intact dilation and extraction, also known as partial-birth;

32 (c) Whether an intrafetal injection was used in an attempt to
33 induce fetal demise such as, but not limited to, intrafetal potassium
34 chloride or digoxin;

35 (d) Age of the patient;

36 (e) If the probable postfertilization age was determined to be at
37 the point of viability or later, whether the reason for the abortion
38 was a medical emergency or fetal anomaly and, if the reason was a
39 medical emergency, the basis of the determination that the pregnant

1 woman had a condition which so complicated her medical condition as
2 to necessitate the abortion of her pregnancy to avert her death or to
3 avert serious risk of substantial and irreversible physical
4 impairment of a major bodily function, not including psychological or
5 emotional conditions;

6 (f) If the probable postfertilization age was determined to be at
7 the point of viability or later, whether or not the method of
8 abortion used was one that, in reasonable medical judgment, provided
9 the best opportunity for the unborn child to survive and, if such a
10 method was not used, the basis of the determination that termination
11 of the pregnancy in that manner would pose a greater risk either of
12 the death of the pregnant woman or of the substantial and
13 irreversible physical impairment of a major bodily function, not
14 including psychological or emotional conditions, of the woman than
15 would other available methods; and

16 (g) Other demographic information that the department of health
17 determines is necessary.

18 (2) Reports required by subsection (1) of this section shall not
19 contain the name or the address of the patient whose pregnancy was
20 terminated, nor shall the report contain any other information
21 identifying the patient, except that each report shall contain a
22 unique medical record identifying number, to enable matching the
23 report to the patient's medical records. The reports must be
24 maintained in strict confidence by the department, must not be
25 available for public inspection, and must not be made available
26 except:

27 (a) To the attorney general or solicitor with appropriate
28 jurisdiction pursuant to a criminal investigation;

29 (b) To the attorney general or solicitor pursuant to a civil
30 investigation of the grounds for an action under section 7 of this
31 act; or

32 (c) Pursuant to court order in an action under section 7 of this
33 act.

34 (3) By June 30th of each year, the department of health shall
35 issue a public report providing statistics for the previous calendar
36 year compiled from all of the reports covering that year submitted in
37 accordance with this section for each of the items listed in
38 subsection (1) of this section. Each report also shall provide the
39 statistics for all previous calendar years during which this section
40 was in effect, adjusted to reflect any additional information from

1 late or corrected reports. The department of health shall take care
2 to assure that none of the information included in the public reports
3 could reasonably lead to the identification of any pregnant woman
4 upon whom an abortion was performed, induced, or attempted.

5 (4) Any facility that fails to submit a report by the end of
6 thirty days following the due date must be subject to a late fee of
7 one thousand dollars for each additional thirty-day period or portion
8 of a thirty-day period the report is overdue. Any facility required
9 to report in accordance with this section that has not submitted a
10 report, or has submitted only an incomplete report, more than six
11 months following the due date, may, in an action brought by the
12 department of health, be directed by a court of competent
13 jurisdiction to submit a complete report within a period stated by
14 court order or be subject to civil contempt. Intentional or reckless
15 falsification of any report required under this section is a gross
16 misdemeanor punishable by not more than three hundred sixty-four days
17 in prison.

18 (5) Within ninety days of the effective date of this section, the
19 department of health shall adopt forms and rules to assist in
20 compliance with this section. Subsection (1) of this section shall
21 take effect so as to require reports regarding all abortions
22 performed or induced on and after the first day of the first calendar
23 month following the effective date of such rules.

24 NEW SECTION. **Sec. 6.** A new section is added to chapter 9.02 RCW
25 to read as follows:

26 Any physician who intentionally or knowingly fails to conform to
27 any requirement in sections 3 and 4 of this act is guilty of a class
28 C felony and, upon conviction, must be fined not less than two
29 thousand dollars nor more than ten thousand dollars or imprisoned for
30 not more than five years, or both. No part of the minimum fine may be
31 suspended. For conviction of a third or subsequent offense, the
32 sentence must be imprisonment for not less than sixty days nor more
33 than three years, no part of which may be suspended.

34 NEW SECTION. **Sec. 7.** A new section is added to chapter 9.02 RCW
35 to read as follows:

36 (1) Sections 3 and 4 of this act may not be construed to repeal,
37 by implication or otherwise, RCW 9.02.120 or any other applicable
38 provision of state law regulating or restricting abortion. An

1 abortion that complies with sections 3 and 4 of this act but violates
2 the provisions of RCW 9.02.120 or any other applicable provision of
3 state law must be considered unlawful as provided in such provision.
4 An abortion that complies with the provisions of RCW 9.02.120 or any
5 other applicable provision of state law regulating or restricting
6 abortion but violates section 3 or 4 of this act must be considered
7 unlawful.

8 (2)(a) If some or all of the provisions of this act are
9 temporarily or permanently restrained or enjoined by judicial order,
10 all other provisions of state law regulating or restricting abortion
11 must be enforced as though such restrained or enjoined provisions had
12 not been adopted.

13 (b) Subsection (2)(a) of this section does not apply if a
14 temporary or permanent restraining order of injunction is stayed or
15 dissolved, or otherwise ceases to have effect, in which case those
16 provisions shall have full force and effect.

17 **Sec. 8.** RCW 9.02.100 and 1992 c 1 s 1 are each amended to read
18 as follows:

19 The sovereign people hereby declare that every individual
20 possesses a fundamental right of privacy with respect to personal
21 reproductive decisions.

22 Accordingly, it is the public policy of the state of Washington
23 that:

24 (1) Every individual has the fundamental right to choose or
25 refuse birth control;

26 (2) Every woman has the fundamental right to choose or refuse to
27 have an abortion, except as specifically limited by RCW 9.02.100
28 through 9.02.170 ~~((and))~~, 9.02.900 ~~((through))~~, 9.02.902, and
29 sections 3 and 4 of this act;

30 (3) Except as specifically permitted by RCW 9.02.100 through
31 9.02.170 ~~((and))~~, 9.02.900 ~~((through))~~, 9.02.902, and sections 3 and
32 4 of this act, the state shall not deny or interfere with a woman's
33 fundamental right to choose or refuse to have an abortion; and

34 (4) The state shall not discriminate against the exercise of
35 these rights in the regulation or provision of benefits, facilities,
36 services, or information.

37 **Sec. 9.** RCW 9.02.110 and 1992 c 1 s 2 are each amended to read
38 as follows:

1 The state may not deny or interfere with a woman's right to
2 choose to have an abortion prior to viability of the fetus, or to
3 protect her life or health, as provided in sections 3 and 4 of this
4 act.

5 A physician may terminate and a health care provider may assist a
6 physician in terminating a pregnancy as permitted by this section.

7 **Sec. 10.** RCW 9.02.900 and 1992 c 1 s 10 are each amended to read
8 as follows:

9 RCW 9.02.100 through 9.02.170 ~~((and))~~, 9.02.900 ~~((through))~~,
10 9.02.902, and sections 3 and 4 of this act shall not be construed to
11 define the state's interest in the fetus for any purpose other than
12 the specific provisions of RCW 9.02.100 through 9.02.170 ~~((and))~~,
13 9.02.900 ~~((through))~~, 9.02.902, and sections 3 and 4 of this act.

14 NEW SECTION. **Sec. 11.** This act may be known and cited as the
15 Washington pain capable unborn child protection act.

--- END ---