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BILL ANALYSIS

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Senate Bill 546 (as enrolled)  
Sponsor: Senator Joel D. Gougeon  
Senate Committee: Families, Mental Health and Human Services  
House Committee: Criminal Law and Corrections

**PUBLIC ACT 107 of 1999**

Date Completed: 9-9-99

**RATIONALE**

During the 1995-96 Congressional and legislative sessions, a particular abortion procedure commonly known as partial-birth abortion became the focus of heated public policy debate. During that session, the United States Congress approved, and the President then vetoed, legislation that would have banned partial-birth abortions. When the attempt to establish a national ban was unsuccessful, opponents of abortion pursued legislation in several states attempting to prohibit the procedure at the state level. In Michigan, a ban was enacted by Public Act 273 of 1996 but was later overturned in Federal court, which enjoined enforcement of the law (*Evans v Kelley*, 977 F.Supp. 1283 (E.D. Mich 1997)). Although the *Evans* court ruled Public Act 273 unconstitutional on several grounds, some people believe that the practice of partial-birth abortion is so objectionable as to equate it with infanticide. They contend that the procedure should be prohibited in this State and that a ban can be effectuated by describing in law the actions to be proscribed. (See **BACKGROUND** for further information on the *Evans* case and other abortion-related court cases.)

**CONTENT**

The bill created the "Infant Protection Act" within the Michigan Penal Code. Under the bill, it will be a felony, punishable by imprisonment for life or any term of years, a maximum fine of \$50,000, or both, if a person intentionally performs a procedure or takes any action upon a "live infant" with the intent to cause the infant's death. The bill defines "live infant" as a human fetus at any point after any "part of the fetus" is known to exist "outside of the mother's body" and has a detectable heartbeat, evidence of spontaneous movement, or evidence of breathing. "Part of the fetus" means "any portion of the body of a human fetus that has not been severed from the fetus, but not including the umbilical cord or placenta". "Outside of the mother's body" means "beyond the outer abdominal wall or beyond the plane of the vaginal introitus".

It will not be a violation of the bill if a physician takes measures, at any point after a live infant is partially

outside the mother's body, that, in the physician's reasonable medical judgment, are necessary to save the life of the mother and if every reasonable precaution also is taken to save the life of the live infant. The bill also will not apply to an action taken by the mother, but will not exempt the mother from any other provisions of law.

The bill includes a statement that, "The legislature finds all of the following:

- (A) That the constitution and laws of this nation and this state hold that a live infant completely expelled from his or her mother's body is recognized as a person with constitutional and legal rights and protection.
- (B) That a live infant partially outside his or her mother is neither a fetus nor potential life, but is a person.
- (C) That the United States Supreme Court decisions defining a right to terminate pregnancy do not extend to the killing of a live infant that has begun to emerge from his or her mother's body.
- (D) That the state has a compelling interest in protecting the life of a live infant by determining that a live infant is a person deserving of legal protection at any point after any part of the live infant exists outside of the mother's body."

The bill includes an effective date of October 1, 1999, but did not receive immediate effect approval in the House of Representatives. The bill, then, will take effect on the 91st day after the Legislature adjourns sine die.

MCL 750.90g

**BACKGROUND**

The following is a brief discussion of Michigan's partial-birth abortion challenge and several significant abortion decisions of the United States Supreme Court.

In this 1997 Federal case in the Eastern District of Michigan, the State's 1996 statute banning partial-birth abortion was ruled unconstitutional and, as such, was enjoined.

Public Act 273 of 1996 amended the Public Health Code to prohibit a "partial-birth abortion", except to save the life of a pregnant woman. "Partial-birth abortion" was defined as a procedure in which a physician or a person acting under a physician's delegatory authority partially vaginally delivered a living fetus before killing the fetus and completing the delivery.

The plaintiffs claimed that Public Act 273 was unconstitutionally vague and overbroad and that its exception for saving a pregnant woman's life was too narrow. They contended that the statute did not provide "clear notice of the specific procedure or procedures proscribed"; was "subject to multiple and confusing interpretations" and could "be read to encompass a number of abortion procedures"; lacked "any intent requirement"; swept "within its proscription substantially all second-trimester pre-viability abortion procedures"; had "the purpose and effect of imposing an undue burden on women seeking post-first-trimester abortions in Michigan" in violation of the U.S. Supreme Court's decision in *Casey* (described below); and had a "constitutionally insufficient" exception provision because it applied only "to save the life of a pregnant woman" and not "for procedures necessary to protect a woman's health".

The defendants argued that the Act would have prohibited "only one particular method of abortion"; did "contain an intent requirement by implication and by reference"; and did "not impose an undue burden on the woman's right to an abortion since other alternative procedures" would continue to be available.

The *Evans* Court found that the definition of "partial birth abortion" in Public Act 273 was "hopelessly ambiguous and not susceptible to a reasonable understanding of its meaning", in violation of Due Process requirements that persons subject to regulation have a reasonable opportunity to know what conduct is prohibited. The Court declared the entire statute void. The Court also found that the statute included within its prohibition several abortion procedures, including one that "is used in more than 85% of the post-first trimester abortions performed in Michigan". The Court then concluded that Public Act 273 was "facially overbroad because in a substantial percentage of cases in which the statute is implicated, it will operate as a substantial obstacle to a woman's choice to undergo an abortion", thereby placing an "undue burden" on women seeking an abortion, in violation of *Casey*.

In this 1973 decision, the U.S. Supreme Court held that a state law that criminalized abortions except those necessary to save the mother's life, without regard to pregnancy stage and without recognition of the other interests involved, violated the Due Process Clause of the Fourteenth Amendment. The Court found that the constitutional right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy...but that this right is not unqualified and must be considered against important state interests in regulation"; and, "a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision".

The Court then concluded that, for the stage before the approximate end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. For the stage after the approximate end of the first trimester, the state, in promoting its interest in the health of the mother, may regulate the abortion procedure in ways that are reasonably related to maternal health. For the stage subsequent to viability, the state, in promoting its interest in the potentiality of human life, may regulate and even proscribe abortion except when it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

This 1976 case apparently is the only U.S. Supreme Court decision involving the constitutionality of a ban on a specific abortion procedure. In addition to addressing issues of informed consent, spousal consent, and parental consent, as well as other statutory provisions, the Court held that a Missouri statute banning the saline amniocentesis abortion procedure was unconstitutional. According to the trial court record, this method was one of the most commonly used in the nation after the first trimester, and, with respect to maternal mortality, safer than continuation of the pregnancy until normal childbirth. The Supreme Court reasoned that, "as a practical matter, it forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed". The Court concluded that the ban on the procedure constituted an "unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting the vast majority of abortions after the first 12 weeks. As such, it does not withstand constitutional challenge."

(462 U.S. 416)

The U.S. Supreme Court in 1983 found unconstitutional provisions of an Akron, Ohio, ordinance that mandated a 24-hour waiting period before an abortion, and required a physician to give a patient certain information, including the anatomical and physiological characteristics of the fetus, and particular physical and emotional complications that could result from undergoing an abortion.

The Court found that the ordinance was "designed not to inform the woman's consent but rather to persuade her to withhold it altogether". The Court also ruled that "the State's legitimate concern that the woman's decision be informed is not reasonably served by requiring a 24-hour delay as a matter of course".

*Thornburgh v American College of Obstetricians and Gynecologists* (476 U.S. 747)

In 1986, the Court invalidated Pennsylvania's informed consent requirement because, like the Akron ordinance, the Pennsylvania law prescribed a detailed method for obtaining the informed consent. The Court stated, "The printed materials required by [the statute] seem to us to be nothing less than an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician."

*Webster v Reproductive Health Services* (492 U.S. 490)

In this 1989 case, the Court abandoned its trimester framework of *Roe v Wade*, stating that, "we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability". The Court upheld a Missouri statute that requires a physician, before performing an abortion on a woman whom the doctor has reason to believe is 20 or more weeks pregnant, to ascertain whether the fetus is viable by performing certain medical examinations and tests; prohibits public employees from performing an abortion not necessary to save the mother's life; and prohibits the use of public facilities for performing an abortion not necessary to save the mother's life.

*Planned Parenthood of Southeastern Pennsylvania v Casey* (505 U.S. 833)

In this 1992 plurality opinion, the Court reaffirmed the essential holdings in *Roe* that: A woman has the right to terminate her pregnancy before fetal viability occurs without any undue interference from the state; a state has the power to restrict abortions after

viability, if the law contains exceptions for a pregnancy that endangers the woman's life or health; and the state has a legitimate interest from the outset of a pregnancy in protecting the health of the woman and the potential life of the fetus that may become a child. The Court, however, also affirmed the rejection in *Webster* of the rigid trimester framework outlined in *Roe*, reasoning that that approach was incompatible with the state's interest in potential life throughout the pregnancy. To promote this interest, the state may take measures to ensure that a woman's choice is informed. In a departure from principles expressed in *Thornburgh*, *Casey* reasoned that informed consent measures are not invalid if their purpose is to persuade choice of childbirth, as long as those measures do not place an "undue burden" on the woman's right of choice.

The plurality *Casey* opinion, then, adopted an "undue burden" standard for evaluating a state's abortion restrictions and held that an undue burden exists when a provision of law has the purpose or effect of placing a "substantial obstacle" in the path of a woman seeking an abortion before fetal viability. Using this standard, the Court ruled that Pennsylvania's informed consent provisions--including a 24-hour waiting period and fetal descriptions--did not pose an undue burden on a woman's right to terminate a pregnancy, although the Court did reject a spousal notification requirement. In upholding major portions of Pennsylvania's abortion restrictions statute, the Court overruled *Akron* and *Thornburgh* to the extent that they found a constitutional violation when government requires the giving of truthful, nonmisleading information regarding the nature of abortion procedures, attendant health risks of abortion and childbirth, and a fetus's probable gestational age. The *Akron* and *Thornburgh* rulings, according to *Casey*, were inconsistent with the acknowledgment in *Roe* of an important interest in potential life.

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

The activities that the bill proscribes are very close to infanticide and deserve comparable punishment. At the point when a child is more born than unborn (i.e., the infant is partially outside the mother's body), he or she should be protected from being killed. Partial-birth abortion is a gruesome procedure whereby a nearly full-term fetus is partially delivered and then killed by means of having its skull crushed or incised before the delivery is completed. Reportedly, several thousand partial-birth abortions are performed nationwide each year, most on nonmedical grounds, and many physicians contend that there is no medical need for the procedure because there are

other, safer methods for terminating a pregnancy. This extreme practice should not be tolerated in a civilized society and violations should be appropriately punished. While the bill does not specifically refer to partial-birth abortion by name, it provides for serious criminal penalties--i.e., imprisonment for life or any term of years and/or a maximum fine of \$50,000--for the intentional killing of a live infant partially outside the mother's body.

**Response:** It is misleading to describe partial-birth abortion as a procedure in which a nearly full-term, healthy fetus is destroyed in a horribly gruesome manner. Reportedly, the vast majority of partial-birth abortions are performed during the second trimester, long before the fetus is viable (that is, capable of surviving outside the womb, with or without medical assistance); and only about 0.04% of abortions of any type are performed after 26 weeks. (Viability is generally considered to occur at 24 weeks, while a full-term pregnancy is 40 weeks.) In regard to safety, the partial-birth method actually is said to be one of the safest options available for midpregnancy termination, and it is significantly less risky than alternatives that may be used to get around the ban. Furthermore, every method of abortion, at any stage of pregnancy, sounds like a horribly gruesome procedure if it is described in detail. That does not change constitutionally protected rights.

#### **Opposing Argument**

The bill's definition of "live infant" fails to distinguish between a fetus in the first few weeks of gestation and a full-term live birth. Thus, it serves to criminalize many earlier-term, constitutionally protected abortions, even those performed in the first trimester. Also, the bill's description of the procedure could be interpreted to include other, more widely used, abortion procedures that are considered to be medically safe. As a result, in violation of *Casey*, the bill will have the effect of placing a "substantial obstacle" in the path of a woman seeking a legal, constitutionally protected abortion before the fetus attains viability, just as Public Act 273 was ruled to have done in the *Evans* case. The bill's constitutional defects are similar to those of Public Act 273, and it is likely that the bill will not successfully withstand a legal challenge to its constitutionality.

**Response:** The bill takes a different approach from Public Act 273. Instead of addressing any particular medical procedure, the bill provides criminal penalties for the intentional killing of a live infant, not the termination of a pregnancy and removal of a fetus from the womb. Abortion procedures that do not violate the bill remain available and accessible to a woman seeking an abortion. In a footnote to the *Evans* opinion, the Federal Court expressed its own belief that, "...the Michigan Legislature may constitutionally regulate abortion practices in Michigan, and specifically, that the Legislature can, consistent with *Casey* and other

Supreme Court precedent, tailor an abortion regulation that would avoid the pitfalls of vagueness and overbreadth and pass constitutional muster."

#### **Opposing Argument**

In addition to early-term abortions that fall under the bill's prohibitions, a number of other situations could be criminalized. For example, the bill could be applied to situations in which a physician treats a spontaneous miscarriage. Reportedly, a woman who is experiencing a miscarriage sometimes will arrive at the emergency room at a point where the miscarried fetus might still exhibit signs of life, bringing it under the bill's definition of "live infant". At that point, however, since the fetus has spontaneously aborted, the medically appropriate treatment is to remove the fetus. As a result, a doctor who treats a woman under such circumstances might be considered in violation of the bill. Also, in a situation in which a woman is pregnant with twins and the life of one of the twins can be assured only by the removal of the other, the physician may be required to terminate one of the twin fetuses for the sake of the mother and the other twin.

**Response:** The bill requires that the physician have the "intent" to kill the infant. A doctor dealing with a miscarriage or removal of one twin to expand the survival chances of the other would not be acting with the criminal intent to kill the infant, but would instead be acting with the intent either to save the mother or to ensure or enhance the survival of the other twin.

#### **Opposing Argument**

If the desire of the bill's proponents is to prevent the practice of partial-birth abortion in the late stages of pregnancy, they need not pursue legislation. As the Federal district court pointed out in *Evans*, in the 1973 post-*Roe* case of *People v Bricker* (389 Mich 524), the Michigan Supreme Court sought to save what it could of Michigan's statute outlawing abortion. Section 14 of the Michigan Penal Code makes it a felony to administer any substance or use any instrument or other means with the intent to cause a miscarriage, unless it is necessary to save the life of the pregnant woman (MCL 750.14). In light of *Roe*, the Michigan Court construed that section of the Penal Code "to mean that the prohibition...shall not apply to 'miscarriages' authorized by a pregnant woman's attending physician in the exercise of his medical judgment; the effectuation of the decision to abort is also left to the physician's judgment; however a physician may not cause a miscarriage after viability except where necessary, in his medical judgment, to preserve the life or health of the mother". So, late-term abortions, whether performed by the "partial-birth abortion" procedure or otherwise, already are prohibited in Michigan.

Legislative Analyst: P. Affholter

## **FISCAL IMPACT**

Senate Bill 546 will have an indeterminate fiscal impact on State government.

There are no data to indicate how many people will be convicted of causing the death of a live infant as defined in the bill. Assuming that an average life sentence results in an offender's being incarcerated for 50 years, and that the average cost of incarceration during that time is \$22,000 per year, for each person convicted of this crime the State will incur \$1.1 million of cost.

Fiscal Analyst: K. Firestone

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.