House
Legislative
Analysis
Section

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LEGAL BIRTH DEFINITION ACT

House Bill 4603 (Substitute H-1)
Sponsor: Rep. David Robertson

Senate Bill 395 as passed by the Senate
Sponsor: Sen. Michelle McManus

Committee: Family and Children Services

First Analysis (5-8-03)

THE APPARENT PROBLEM:

Since the mid-1990s, many attempts have been made at the federal level and by various states to ban a particular abortion procedure known as "partial-birth abortion" or dilation and extraction (D & X), as it is called by the medical community. Legislation passed by Congress was subsequently vetoed by then President Clinton, and state attempts to ban the procedure have been largely voided by court challenges.

In Michigan, Public Act 273 of 1996 amended the Public Health Code to prohibit, except to save the life of a pregnant woman, partial-birth abortion procedures. The state was later enjoined in federal district court from enforcing Public Act 273. In *Evans* v *Kelly*, 977 F Supp 1283, (ED Mich 1997), the court found the ban under Public Act 273 to be unconstitutional due to being vague and overbroad, and unconstitutionally imposing "an undue burden on a woman's right to seek a previability second trimester abortion." However, the court noted in a footnote that it believed that the legislature could constitutionally regulate abortion practice in the state provided that such regulations were consistent with U.S. Supreme Court decisions.

A second state attempt to ban partial-birth abortion procedures was made with the enactment of Public Act 107 of 1999 which created the Infant Protection Act within the Michigan Penal Code. The act made it a felony, punishable by imprisonment for life or any term of years or a fine of up to $50,000, or both, if a person intentionally performed a procedure or took any action upon a "live infant" with the intent to cause the infant's death. Once again, the act was challenged in federal district court. The federal court consolidated two cases challenging the act [*WomanCare of Southfield* v *Granholm* (Case No. 00-CV-70585, 2000) and *Evans* v *Granholm* (Case No. 00-CV-70586, 2000)]. The attorney general and state law enforcement personnel were temporarily enjoined from enforcing the act in March 2000, and in April 2001, the court granted the plaintiffs' motion for summary judgment. In its decision, the court noted that "[a]ny law restricting a woman's right to choose a pre-viability abortion must contain an adequate safeguard to protect the life and health of the pregnant woman."

Proponents of banning partial-birth abortions have in the past likened the procedure to infanticide, describing 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. Many believe that there is supporting evidence that other, safer medical procedures exist for terminating a late-term pregnancy, and that many of the partial-birth abortions performed each year are medically unnecessary. For those reasons, opponents of this procedure remain undaunted. Since past attempts to ban the procedure have been unsuccessful, many feel that a better approach is to define the moment when a fetus is considered to have been "born" and therefore entitled to enjoy the protections afforded under law for all living persons. In this way, it is believed that a woman's constitutional right to an abortion would remain protected, but that a viable fetus would also be protected from what many consider to be an offensive and heinous procedure.

THE CONTENT OF THE BILLS:

The bills, which are identical, would create the Legal Birth Definition Act to define "perinate" and specify that a perinate must be considered a legally born

person for all legal purposes. Specifically, the bills would do the following:

• categorize "perinates" as persons for legal purposes;

• provide criminal, civil, and administrative immunity to a physician, or a person acting under the authority of a physician, who performs a procedure resulting in a perinate's injury or death if the physician had determined that the procedure was necessary to save the mother's life; and

• report various legislative findings.

Legal Birth. Under the bill, a perinate would be considered a legally born person for all purposes under the law. "Perinate" would mean a live human being at any point after which any anatomical part of that human being was known to have passed beyond the plane of the vaginal "introitus" (i.e., opening) until the point of complete expulsion or extraction from the mother's body. "Live" would mean demonstrating one or more of the following biological functions: a detectable heartbeat, evidence of breathing, or evidence of spontaneous movement. "Anatomical part" would mean any portion of the human anatomy that had not been severed from the body, but not including the umbilical cord or placenta.

Immunity. The bill specifies that a physician, or an individual performing an act, task, or function under a physician's delegatory authority, would be immune from criminal, civil, or administrative liability for performing any procedure that resulted in injury to or the death of a perinate while completing the delivery of the perinate if, in the physician's reasonable medical judgment and in compliance with the applicable standard of practice and care, the procedure was necessary to save the mother's life and every reasonable effort was made to preserve the life of both the mother and the perinate. Nothing in the act could abrogate any existing right, privilege, or protection under criminal or civil law that applied to an embryo or fetus.

Legislative Findings. The bill reports the following legislative findings:

• "That in Roe v Wade the United States Supreme Court declared that an unborn child is not a person as understood and protected by the constitution, but any born child is a legal person with full constitutional and legal rights."

• "That in Roe v Wade the United States Supreme Court made no effort to define birth or place any restrictions on the states in defining when a human being is considered born for legal purposes."

• "That, when any portion of a human being has been vaginally delivered outside his or her mother's body, that portion of the body can only be described as born and the state has a rational basis for defining that human being as born and as a legal person."

• "That the state has a compelling interest in protecting the life of a born person."

BACKGROUND INFORMATION:

For more information on Public Act 273 of 1996 and Public Act 107 of 1999, see the House Legislative Analysis Section's analysis of enrolled House Bill 5889 dated 6-18-96 and the Senate Fiscal Agency's analysis of enrolled Senate Bill 546 dated 9-9-99, respectively.

Further, ongoing attempts to ban partial-birth abortions are continuing at the federal level with the introduction of S.3 – the Partial-Birth Abortion Ban Act of 2003. The bill has been passed by the Senate. A companion bill, H.R. 760, is pending action in the House Judiciary Committee.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bills, which are identical, could result in fiscal implications to the state by the establishment of an earlier point identified as the point of live birth than is established to date by law and by the courts. (5-6-03)

ARGUMENTS:

For:

Rather than outlawing a particular procedure, the bills seek instead to establish a boundary for abortions. Under the bills, a perinate would be considered born when any part of his or her body passed beyond the plane of the mother's vaginal introitus (opening), as opposed to birth applying only when the entire fetus is expelled or extracted from the womb. Once "born", a perinate would enjoy all the protections and benefits under law.

According to the *Online Medical Dictionary*, "perinate" refers to an "infant of the perinatal period" which is "in the period shortly before and after birth, variously defined as beginning with completion of

the 20th to 28th week of gestation and ending seven to 28 days after birth". Between the definition contained in the bills and the understanding of perinate by the medical community, many believe that the bills will end what is they consider to be a particularly gruesome abortion procedure used to terminate late-term pregnancies. The bills also complement legislation enacted late last year (the Born Alive Infant Protection Act and related legislation) which states that if an abortion results in the live birth of a newborn, the newborn is a legal person for all purposes under the law.

By granting protection as soon as a single part of a baby's anatomy clears the vaginal opening, the bills as written clearly apply only to the partial-birth abortion procedure; it should not infringe on constitutionally protected abortion rights for early or mid-term abortions, nor interfere with medical procedures used when a woman miscarries. Further, the language in the bills pertaining to the immunity granted to physicians and their delegates also makes it clear that the bills are restricting the prohibition to partial-birth abortions, for, reportedly, it is the only procedure used to end late-term pregnancies that does so by partially delivering a baby and then killing it before it is fully delivered. However, any procedure could be used to save the life of the mother as long as every reasonable effort had been made to preserve the life of both the mother and the infant.

Therefore, by being so restrictive, the bills should be able to withstand the types of court challenges that have nullified previous legislation.

Against:

Contrary to the beliefs held by proponents of the bills, the bills fail to address the very weaknesses that doomed the previous legislative attempts to ban partial-birth abortions. Specifically, the following could prove problematic:

- The U.S. Supreme Court has been clear that state restrictions on abortion must contain exceptions (throughout all nine months of pregnancy) for pregnancies which endanger the life or health of the woman. (*Roe* v *Wade* and more recently, *Planned Parenthood* v *Casey*). The bills do not contain an exclusion to protect the health of a woman.

- The bills could be interpreted to apply to any stage of gestation – thereby outlawing abortion altogether. In fact, opponents of the bills believe this is their intent. They argue that this is another attack on the reproductive rights of women. The bills would not be able to withstand a court challenge on such clearly unconstitutional grounds, as the controlling opinion in *Casey* upholds the right of a woman to have an abortion before viability without undue influence from a state.

- The immunity offered in the bills may not extend to physicians and medical personnel providing medical care to a woman having a spontaneous abortion (miscarriage) and who arrives at the emergency room with a part or parts of the fetus extending beyond the vaginal opening. In such scenarios, the woman often is in danger of bleeding to death, and medical attention must be focused on stopping the hemorrhaging and saving the woman's life. However, if "every reasonable effort" was not made to save the fetus (or perinate), a physician or his or her delegate could face some type of criminal, civil, or administrative penalty (the bill is unclear as to possible penalties) even if a procedure other than a partial-birth procedure was used. The term "reasonable effort" is not clearly defined. Would doctors be expected to perform CPR on fetuses too young to breathe on their own or too young even for life support? When doctors are faced with a medical emergency, when seconds can mean the difference between life and death, or reproductive health or sterility, should medical personnel be taking time to decide if their choice of action may result in the loss of licensure or a tort action, or even worse, a criminal penalty? Doctors need to be unhindered in using standard medical practices to decide, with the input of the patient, the best mode of treatment – not be worried that they are about to cross some vague and moving threshold called "reasonable effort."

- The bills would continue a dangerous slide down a slippery slope where medical services are decided by lawmakers rather than by the medical community based on standard medical practices. Decisions regarding medical care must be left in the hands of physicians and their patients. Safeguards already exist within hospital review teams, medical societies, and state regulatory structures to ensure that patients receive safe, quality care delivered by trained medical professionals.

- Planned Parenthood has argued that the best way to prevent abortion is to reduce unwanted pregnancies, and yet the legislature has reduced state funding for programs to help accomplish this and has failed to enact legislation to provide contraceptive equity for health insurance, contraception training for health workers, and comprehensive sexuality education. They say that almost 90 percent of all abortions in Michigan are performed before 12 weeks of gestation and that less than 1 percent take place after 20 weeks,

and at most institutions those can only be performed for serious maternal disease or fetal abnormalities.

• Opponents of the bills note that the state has spent considerable amounts of money in losing previous cases defending bans on so-called partial birth abortion. Twice since 1997, the state has had to pay the legal fees of the American Civil Liberties Union (reportedly totaling $250,000). Does the legislature really want to put the state through this exercise again?

Response:

Supporters of the bill say the opponents concerns about the scope of the bill are unfounded. The sponsor of the House bill publicly stated in his testimony before the House Family and Children Services Committee that the sole intent of the legislation was to deal with the procedure known as partial-birth abortion. Further, the legislative intent stated in the bills makes it clear that the purpose of the bills is to protect the lives of those who have been born, and while not defined in the bill, the term "perinate" is understood to refer to a fetus from 21 weeks on. The bill is not intended to apply to previable fetuses. Also, the inclusion of the definition "anatomical parts" would clearly exclude spontaneous miscarriages and, according to a Lansing-based gynecologist who submitted written testimony on the bills, this definition would also exclude abortion procedures used earlier in pregnancies. He says that since most other late-term abortion procedures are not meant to deliver an intact and living child (the fetus is either dismembered in-utero and the parts removed via extraction or delivered intact but already dead), the bills would not apply to those procedures. If a procedure does not go as planned and a living, intact child is delivered, the legislation from last year, the Born Alive Infant Protection Act, would prevail.

It is also true that the bills do not specifically state an exclusion to protect the health of a woman, but proponents say that is implied from the language contained in the immunity provision. Also, a representative of Right to Life of Michigan appeared, in his testimony before the House committee, to support the addition of language that was more specific in regards to a health exclusion. However, he said that the prevailing U.S. Supreme Court interpretation of the word "health" is so broad and vague as to cover not just physical health, but also mental health, financial health, and so on, and that to add a more specific exclusion would need to be done carefully so as to provide the necessary protection to a woman's health without undermining the stated purpose of the legislation: to end the practice of a particularly gruesome and heinous abortion procedure used primarily on viable fetuses. Supporters also say, as to the liability of physicians contained in the bills, that a physician operating within standards developed by the medical profession (not by the legislature) will enjoy immunity from legal and administrative actions, as is the case with other kinds of medical practice and care.

POSITIONS:

Right to Life – Lifespan of Metro Detroit submitted written testimony supporting the bills. (5-6-03)

A representative of Right to Life of Michigan testified in support of the bills. (5-6-03)

A representative of the Michigan Catholic Conference testified in support of the bills. (5-6-03)

The Michigan Section American college of Obstetricians and Gynecologists submitted written testimony opposing the bills. (5-6-03)

The Michigan State Medical Society submitted written testimony opposing the bills. (5-6-03)

The American Civil Liberties Union/Michigan submitted written testimony opposing the bills. (5-6-03)

The National Organization for Women Michigan Conference submitted written testimony opposing the bills. (5-6-03)

The Michigan Pro-Choice Education Network submitted written testimony opposing the bills. (5-6-03)

Planned Parenthood Affiliates of Michigan submitted written testimony opposing the bills. (5-6-03)

A representative of MARAL testified in opposition to the bills. (5-6-03)

Analyst: S. Stutzky

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.