Legislative Analysis

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PROHIBIT DISMEMBERMENT ABORTIONS

House Bills 4833 and 4834 reported without amendment
Sponsor: Rep. Laura Cox
Committee: Criminal Justice
Complete to 7-12-16

BRIEF SUMMARY: House Bill 4833 will prohibit a dismemberment abortion, define the term, apply the same criminal penalty for a violation and civil remedies as currently provided for a partial-birth abortion, and make each provision in the bill and every application of those provisions severable from each other. House Bill 4834 will revise the sentencing guidelines for a violation of the prohibition on partial-birth abortions to also include a dismemberment abortion.

The bills are tie-barred to each other, meaning neither can take effect unless both are enacted. The bills have an effective date of January 1, 2016.

FISCAL IMPACT: House Bill 4833 would have an indeterminate fiscal impact on state correctional systems. House Bill 4834 would have no fiscal implications. (See ***FISCAL INFORMATION*** below for more information.)

THE APPARENT PROBLEM:

When an elective abortion is performed during the second trimester, generally understood to mean 15 to 23 weeks after a woman's last menstrual period, the procedure used most often is dilation and evacuation, also known as a D&E or dismemberment abortion. A dismemberment abortion is done surgically, as described below in the Background Section. Due to the manner in which the fetus is removed from the uterus, coupled with the gestational age of the fetus, some believe that the procedure rises to the level of being cruel and barbaric to the fetus. In some countries, on the other hand, such as China and European countries, most second trimester abortions are done medically through a combination of the drugs mifepristone and misoprostol. Since there appears to be a medically acceptable alternative to dismemberment abortions, some believe the procedure should be prohibited similarly to partial-birth abortions and allowed only when necessary to save the life of the mother.

THE CONTENT OF THE BILLS:

House Bill 4833 amends Section 90h of the Michigan Penal Code, entitled the "Partial-birth Abortion Ban Act" and rename the section as the "Partial-birth Abortion and Dismemberment Abortion Ban Act" (MCL 750.90h). Briefly, the Partial-birth Abortion Ban does the following:

- Provides that a person who performs a partial-birth abortion is guilty of a felony punishable by imprisonment for up to two years and/or a maximum fine of $50,000.
- Makes an exception for a partial-birth abortion that is necessary to save the mother's life.
- Provides that a woman who obtains a partial-birth abortion is not guilty of a violation.
- Allows the mother's spouse or, if the mother were a minor, her parents, to bring a civil action against the person who performed a partial-birth abortion to recover actual damages, including damages for emotional distress, and treble damages for the cost of the partial-birth abortion. The provision does not apply if the pregnancy is result of the plaintiff's criminal conduct or if the plaintiff consented to the partial-birth abortion.

The bill would apply the above provisions to both a dismemberment abortion and a partial-birth abortion.

Definition of "Dismemberment Abortion"

"Dismemberment abortion" is defined to mean an abortion in which the physician, an individual acting under the delegatory authority of the physician, or any other individual performing the abortion deliberately and intentionally uses any instrument, device, or object to dismember a living fetus by disarticulating limbs or decapitating the head from the fetal torso and removing the dismembered fetal body parts from the uterus regardless of whether the fetal body parts are removed by the same instrument, device, or object or by suction or other means. The term would not include an abortion that uses suction to dismember and remove the body of a fetus from the uterus.

Severability of Provisions

Further, the bill contains an enacting section that is virtually identical to one contained in the Partial-birth Abortion Ban Act. Essentially, Enacting Section 3 provides for severability. This means that if one or more provisions or applications of a provision are found by a court to be invalid, the remainder of the bill's provisions and the application to other circumstances will remain in force. Under the bill, all constitutionally valid applications are to be severed from any applications that a court finds to be invalid, thereby leaving the valid applications in force because, as stated in the bill, it is the legislature's intent and priority that the valid applications be allowed to stand alone.

Construction of Law

The bill's provisions would have to be construed, as a matter of state law, to be enforceable up to but no further than the maximum possible extent consistent with federal constitutional requirements, even if that construction is not readily apparent, as such constructions are authorized only to the extent necessary to save the bill from judicial invalidation. If any court determines that any provision of the bill is unconstitutionally vague, the court must interpret the bill, as a matter of state law, in a manner that avoids the vagueness problem while enforcing the bill's provisions to the maximum possible extent consistent with federal constitutional requirements. (An identical provision was contained in the Partial-birth Abortion Ban Act.)

Sentencing Guidelines

House Bill 4834 amends the sentencing guidelines portion of the Code of Criminal Procedure to specify that performing or assisting in performance of a partial-birth abortion *or dismemberment abortion* is a Class G felony against a person with a maximum term of imprisonment of two years (MCL 777.16d).

BACKGROUND INFORMATION:

The procedure prohibited by the bill is generally known as a dilation and evacuation or D&E and is used in the second trimester. The following information was obtained from information posted on the Michigan Department of Health and Human Services website:

> *This is a procedure generally used after 12 weeks of pregnancy. The procedure will generally be done on an outpatient basis but may sometimes require hospitalization.*
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> *To prepare for the procedure, the physician will enlarge (dilate) the cervix (the opening to the uterus). This may be done over a period of several hours by inserting a small rod or sponge into the cervix which swells as the sponge absorbs moisture. The doctor may choose to enlarge the cervix right before the abortion by inserting and withdrawing larger and larger smooth metal rods until the cervix has been opened to the necessary size.*
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> *The uterus may be scraped with a curette (a sharp, spoon-like instrument). The fetus and placenta are extracted, using forceps or other instruments. This procedure will take approximately 30 minutes.*

FISCAL INFORMATION:

House Bill 4833: The bill could increase costs on the state's correctional system. Information is not available on the number of persons that might be convicted under the provisions of the bill. New felony convictions would result in increased costs related to state prisons and state probation supervision. The average cost of prison incarceration in a state facility is roughly $34,800 per prisoner per year, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision average about $3,760 per supervised offender per year. Any increase in penal fine revenues would increase funding for local libraries, which are the constitutionally-designated recipients of those revenues.

House Bill 4834: The bill amends sentencing guidelines and does not have a direct fiscal impact on the state or on local units of government.

ARGUMENTS:

For:

Most abortions are performed in the first trimester, but when an abortion is done in the second trimester, the majority (by some estimates, more than 90 percent in the US) use the dismemberment abortion procedure to terminate the pregnancy.

Proponents of the bills say dismemberment abortion, which evacuates a fetus from the uterus by literally tearing it limb from limb, is not only heinous, but is not legitimate medicine since the role of doctors is to heal and not do harm. Other countries, including ones with higher abortion rates than the US, use medical abortion more often over dismemberment abortion during the second trimester, indicating that medical abortions are a safe and effective alternative. The bills retain a woman's right to choose whether to carry a pregnancy to term or abort the fetus, as protected by the Constitution and upheld in Supreme Court decisions, and would not limit access to abortion services, as medical abortions may be more widely available and accessible than dismemberment abortions. Further, the bills do not apply when a fetus dies in utero and the procedure is used to remove the dead fetus. Nor would the prohibition or penalty apply if the mother's life was in jeopardy, for example, when a life threatening condition such as preeclampsia necessitates quick removal of the baby.

A medical abortion preserves the fetus intact. This allows examination that may explain why a fetus developed an anomaly in utero, giving the parents and medical team important information that may enable the mother to have a successful birth in the future or give medical researchers valuable information regarding certain fetal anomalies that could lead to breakthroughs in preventing birth defects. Another reason to decrease dismemberment abortions is that the procedure may cause trauma to the cervix, a complication that may occur when artificially dilating it; this can lead to cervical insufficiency in later pregnancies, a condition that can lead to premature birth and miscarriage.

Restricting the use of dismemberment abortions to only those situations in which the mother's life is in jeopardy preserves the sanctity of life and does so during a vulnerable period of development. Enactment of the bills is the humane course of action.

Response:

Since the late 1980s, abortions in Michigan have decreased by more than 44 percent. Some may say this would imply that educational programs (e.g., abstinence programs) and/or increased access to contraception, family planning services, child care, and support services such as free baby items (clothes, diapers, strollers, and cribs), housing assistance, and job training or referrals offered by governmental entities, low-cost clinics, and faith-based service organizations may be effective in mitigating a woman's perceived need to choose abortion.

According to statistics reported by the Guttmacher Institute, among US abortion patients, 75 percent are poor or low income, over half already have a child, 60 percent are in their twenties, and 62 percent report being religiously affiliated. In one 2004 survey, also reported by the Guttmacher Institute, the two main reasons given for choosing abortion

was that a baby would interfere with the woman's work, education, or ability to care for other dependents (74 percent) and inability to afford a baby at the time (73 percent). This trend appears to hold true for Michigan, as 90 percent of women choosing abortion in 2014 were unmarried, and most (two-thirds) lived in Detroit or Wayne, Macomb, or Oakland counties even though women in those three counties account for only 40 percent of the female population statewide. A 2016 study by the Brookings Institute reports that of the top 25 metro areas in the US, Detroit has the highest concentration of poverty by population.

If poverty, employment, access to education, or caring for other children or family members are such strong factors in a woman's choice whether to complete or terminate a pregnancy, perhaps increasing support services to meet these needs would further decrease abortion rates and eliminate the need to seek a legislative ban on a particular procedure.

Against:

To some, the bills represent yet another attempt to use legislation to undermine, and perhaps eventually undo, the protections for women under Roe v Wade and consistently upheld by the courts that a woman has a right to make decisions regarding her health care and to have access to abortion services, should she choose to utilize them. Granted, medical abortion is an option for second trimester procedures, but there are reasons why most second term abortions in the US are done by the D&E method. Some recent medical studies have found that when performed by well-trained and skilled medical professionals, the D&E procedure has fewer complications than medical abortions. The fact that China and some European countries like Finland use medical abortion more often may be due more to lack of such skilled professionals and medical facilities in which to see patients than being a preferred procedure.

Other concerns raised include the following:

- Medical abortion is safest when performed earlier, rather than later, in a pregnancy. But many conditions, such as high blood pressure, fetal anomalies, a serious illness or injury, or, in some cases, a woman finding out she is pregnant, may not happen until the second trimester. With each passing week, the risk of complications for medical abortions increase.

- Medical abortion is contraindicated (not suitable) for use in women with severe asthma; liver disease; clotting disorders; anemia; pulmonary or liver disease; history of cardiovascular disease; allergy to components of the medications; and several other conditions, including an ectopic pregnancy or intrauterine device.

  Continuing a pregnancy may pose a health risk for some women, but the bill would prevent them and their doctors from choosing the safest, most effective treatment for their conditions if the level of harm did not yet rise to being life-threatening. Would the bills inadvertently lead to a woman having to continue a pregnancy until it became life-threatening, and a D&E could be lawfully performed. Or discourage

a physician from performing a D&E, even if clinically indicated as the safest option, over concern of being sued?

- The bills not only remove a woman's personal choice as to which procedure is best for her health and well-being, but also removes the physician's choice of the safest, most appropriate medical procedure for a particular patient.

- The bills could spur long and costly litigation, at taxpayer expense, over the constitutionality of the bills, as two other states that enacted similar measures are experiencing.

POSITIONS:

The following entities testified or submitted written testimony, or otherwise indicated support for the bills on 10-13 or 11-10-15:

Right to Life of Michigan
Michigan Family Forum
Citizens for Traditional Values
Michigan Catholic Conference
Attorney General Bill Schuette
Michigan Department of Health and Human Services

The following entities testified or submitted written testimony, or otherwise indicated opposition to the bills on 10-13 or 11-10-15:

Michigan National Organization of Women (NOW)
American Association of University Women of Michigan
ACLU of Michigan
American Congress of Obstetricians and Gynecologists-Michigan Section
American College of Obstetricians and Gynecologists and the American Congress of Obstetricians and Gynecologists (ACOG)
Sparrow OB-GYN Residency
Scottsdale Women's Center
League of Women Voters-Michigan
Oakland/Macomb NOW
Planned Parenthood Advocates of Michigan
MI-LEAD Coalition
Northland Family Planning Centers
Citizens Against Government Overreach

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Robin Risko

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