

Department of Legislative Services
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FISCAL AND POLICY NOTE
First Reader

House Bill 1167

(Delegate Wivell, *et al.*)

Health and Government Operations

Unborn Child Protection From Dismemberment Abortion Act of 2017

This bill prohibits an individual from purposely performing or attempting to perform a “dismemberment abortion” that kills an unborn child unless the abortion is necessary to prevent a “serious health risk to the pregnant woman.” An individual accused in any proceeding of violating this prohibition may seek a hearing before the State Board of Physicians (MBP) on whether the dismemberment abortion was necessary to prevent a serious health risk to the pregnant woman. MBP’s findings are admissible on that issue at any trial in which a violation of this prohibition is alleged. On motion of the defendant, a court must delay the beginning of a trial for up to 30 days to allow for a hearing before MBP. The bill exempts specified individuals from liability and authorizes specified individuals to bring an action to obtain a permanent injunction or to bring a civil action against an individual who has performed or attempted to perform a dismemberment abortion in violation of the bill, and it establishes additional judicial procedural requirements.

The bill may not be construed to create or recognize a right to an abortion or a right to a particular method of abortion. In addition, the bill’s prohibitions may not be construed to prevent an abortion for any reason, including rape and incest, or by any other method.

Fiscal Summary

State Effect: General fund expenditures for Medicaid decrease under the bill to the extent that fewer abortions are performed. Department of Budget and Management (DBM) expenditures also decrease (75% general funds, 25% special funds) to the extent fewer abortions are performed under the State Employee and Retiree Health and Welfare Benefits Program. Special fund expenditures for MBP increase to the extent the board must conduct required hearings. Revenues are not affected.

Local Effect: The bill's provisions related to civil actions are not expected to materially affect local government operations or finances.

Small Business Effect: Potential meaningful for physicians whose practices currently encompass the bill's specified procedures for abortions. Litigation costs may increase for physicians against whom civil actions are brought under the bill.

Analysis

Bill Summary:

Definitions

“Abortion” means the use of any instrument, medicine, drug, or other substance or device to (1) purposely kill an unborn child or (2) purposely terminate a pregnancy with a purpose other than to produce a live birth and preserve the life and health of the child born alive or to remove the remains of a dead unborn child.

“Attempt to perform a dismemberment abortion” means an act or omission of a statutorily required act that, under circumstances as the individual believes them to be, constitutes a substantial step in the course of conduct planned to culminate in the performance of a dismemberment abortion. The definition includes agreeing to perform, or scheduling or planning to perform, such an abortion whether or not the term “dismemberment abortion” is used and whether or not the agreement is contingent on another factor (such as payment).

“Dismemberment abortion” means, with the intent to cause the death of the unborn child, to purposely dismember a living unborn child by using clamps, grasping forceps, tongs, scissors, or similar instruments that, through the convergence of two rigid levers, slice, crush, or grasp a portion of the unborn child’s body to cut or rip it off and to extract the pieces of the body of the unborn child one at a time with the aforementioned devices or tools or by use of a suction device. The definition does not include an abortion that only uses suction to dismember the body of the unborn child by sucking fetal parts in their entirety into a collection container.

“Serious health risk to the pregnant woman” means the reasonable medical judgment of a physician that the pregnant woman has a condition that so complicates her medical condition that it necessitates the abortion of her pregnancy to avert her death or to avert a serious risk of substantial and irreversible physical impairment of a major bodily function. The definition does not include a psychological or emotional condition.

Exemptions

The bill exempts the following individuals from liability for performing or attempting to perform a dismemberment abortion: (1) the pregnant woman on whom the abortion was performed or attempted; (2) any nurse, technician, secretary, receptionist, or other employee or agent of a physician who performed or attempted to perform a dismemberment abortion and who acts at the direction of the physician; and (3) any pharmacist or other individual who is not a pharmacist who fills a prescription or provides instruments or materials used in the abortion at the direction of or to a physician.

Judicial Proceedings

The following individuals may bring an action to obtain a permanent injunction against an individual who performed or attempted to perform a dismemberment abortion: (1) the pregnant woman on whom the abortion was performed; (2) the spouse, parent, or guardian of, or a licensed or formerly licensed health care provider, of the pregnant woman; or (3) a prosecuting attorney with appropriate jurisdiction.

The following individuals may bring a civil action against the individual who performed a dismemberment abortion: (1) any woman on whom such an abortion was performed; (2) the father of the unborn child, if married to the woman at the time of the abortion; or (3) the maternal grandparents of the unborn child, if the woman was a minor at the time of the abortion or died as a result.

In civil actions brought under the bill, the court may award damages and/or an injunction, as specified. Further, in any civil, criminal, or administrative proceeding brought under the bill, the court must determine whether the identity of any woman on whom such an abortion was performed or attempted must be kept confidential if she does not give her consent to disclosure. The bill specifies additional procedures if a court finds that the woman's identity must be kept confidential. Additionally, in the absence of the written consent of the woman on whom such an abortion was performed or attempted, any individual other than a public official who brings an action must do so under a pseudonym.

Current Law: The State may not interfere with a woman's decision to end a pregnancy before the fetus is viable, or at any time during a woman's pregnancy, if the procedure is necessary to protect the life or health of the woman, or if the fetus is affected by a genetic defect or serious deformity or abnormality. This is consistent with the U.S. Supreme Court's holding in *Roe v. Wade*, 410 U.S. 113 (1973). A viable fetus is one that has a reasonable likelihood of surviving outside of the womb. The Department of Health and Mental Hygiene (DHMH) may adopt regulations consistent with established medical practice if they are necessary and the least intrusive method to protect the life and health of the woman.

If an abortion is provided, it must be performed by a licensed physician. A physician is not liable for civil damages or subject to a criminal penalty for a decision to perform an abortion made in good faith and in the physician's best medical judgment using accepted standards of medical practice.

Background:

Abortions – Generally

According to the Guttmacher Institute, medical professionals customarily date a pregnancy from the first day of the woman's last menstrual period, because it is an easier date for a woman to pinpoint; fertilization usually takes place two weeks after the first day of a woman's last menstrual period. The normal gestational length of a pregnancy is 40 weeks from the beginning of a woman's last menstrual period, or about 38 weeks postfertilization.

The Guttmacher Institute reports that, in 2014, approximately 926,200 abortions occurred in the United States, producing a rate of 14.6 abortions per 1,000 women of reproductive age. (This represents a 14% decrease since 2011, when the abortion rate was 16.9 abortions per 1,000 women.) In Maryland in 2014, 28,140 abortions were provided at a rate of 23.4 abortions per 1,000 women of reproductive age. (This represents an 18% decrease since 2011, when the rate was 28.6 abortions per 1,000 women.) However, 90% of U.S. counties had no abortion clinic in 2014, and 39% of American women of reproductive age lived in these counties. In 2014, 67% of Maryland counties had no clinics that provided abortions, and 24% of Maryland women lived in these counties. Therefore, it is likely that some women who received abortions in Maryland were from other states, while some Maryland residents received abortions in other states. For this reason, the Maryland rate may not accurately reflect the abortion rate of State residents.

In 2014, there were 41 abortion providers in Maryland, of which 25 were clinics. (This represents a 21% increase in overall providers and a 19% increase in clinics since 2011, when there were 34 overall providers, of which 21 were clinics.)

Dilation and Evacuation

According to the Guttmacher Institute, dilation and evacuation, known within the medical community as "D&E," is a surgical abortion procedure that takes place after the first trimester of pregnancy. Similar to a first-trimester surgical procedure, the patient's cervix is dilated and suction is used to remove the fetus. Depending on a variety of factors (including gestational age, the extent of dilation, and providers' training and preference), the provider might also use surgical instruments as a primary or secondary part of the procedure. The bill's definition of "dismemberment abortion" appears to include D&E, when the procedure uses surgical instruments.

The World Health Organization (WHO), in its 2012 publication, [Safe Abortion: Technical and Policy Guidance for Health Systems \(Second Edition\)](#), recommends D&E for abortions performed after 12 to 14 weeks of pregnancy. According to WHO, D&E is the safest and most effective surgical technique for later abortion, where skilled, experienced providers are available. D&E procedures can usually be performed on an outpatient basis with a paracervical block and nonsteroidal anti-inflammatory analgesics or conscious sedation. General anesthesia is not required and can increase risk. According to the Guttmacher Institute, 11% of abortions in the United States take place after the first trimester, and national estimates suggest that D&E accounts for roughly 95% of these procedures.

Other States, Litigation, and Federal Legislation

The Guttmacher Institute reports that at least seven states (Arkansas, Alabama, Kansas, Louisiana, Mississippi, Oklahoma, and West Virginia) have enacted laws essentially banning D&E; four of the bans are currently not in effect while litigation against them proceeds, and a fifth is scheduled to go into effect in August.

Federal legislation prohibiting dismemberment abortion, titled the “Dismemberment Abortion Ban Act,” was introduced in 2015 (H.R. 3515), 2016 (S. 3306), and 2017 (H.R. 1192).

State Expenditures: Women eligible for Medicaid solely due to a pregnancy do not currently qualify for a State-funded abortion. Additionally, based on language in the federal budget, federal funds may not be used for an abortion unless the life of the woman is endangered. Language attached to the Medicaid budget since the late 1970s authorizes the use of State funds to pay for abortions under specific circumstances. Similar language has been attached to the appropriation for the Maryland Children’s Health Program since its advent in fiscal 1999. According to information obtained from DHMH, in fiscal 2016, 7,812 abortions were funded through Medicaid. This reflects the number of claims Medicaid received through November 2016; the actual number of abortions may be slightly higher, as providers have 12 months to bill Medicaid for a service. None of these abortions was eligible for federal matching funds (no abortions were performed under the specified federal exception).

Accordingly, the Department of Legislative Services advises that general fund expenditures for Medicaid decrease under the bill to the extent that fewer abortions are performed and, therefore, funded by Medicaid. Similarly, DBM general fund and special fund expenditures also decrease to the extent fewer abortions are performed under the State Employee and Retiree Health and Welfare Benefits Program. The exact amount of any decrease depends on the proportion of abortions that would be prohibited under the bill and cannot be reliably estimated at this time.

The bill authorizes an individual accused of violating the bill's prohibitions to seek a hearing before MBP. MBP advises that such hearings may require the assistance of an additional assistant Attorney General; further, MBP may incur costs for litigation related to the outcome of hearings. Thus, to the extent MBP is required to conduct hearings under the bill, special fund expenditures increase. Again, the exact amount of any increase depends on the proportion of abortions that would be prohibited under the bill and cannot be reliably estimated at this time.

The bill's provisions related to civil actions are not expected to materially affect caseloads and/or government finances.

Additional Information

Prior Introductions: None.

Cross File: Although designated as a cross file, SB 841 (Senator Ready, *et al.* – Finance) is not identical.

Information Source(s): Department of Health and Mental Hygiene; Judiciary (Administrative Office of the Courts); Guttmacher Institute; World Health Organization; Department of Legislative Services

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